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Supreme Court, U.S.
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No. 94-1244

In The

Supreme Court of the United States

October Term, 1994

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
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SAMUEL T. REES
Counsel of Record
DAAR & NEWMAN
A Professional Law Corporation
865 South Figueroa Street, Suite 2500
Los Angeles, California 90017-2567
Telephone: (213) 892-0999
Counsel for Respondent

LENARD G. WEISS
Counsel of Record
CHRISTINE A. MURPHY
M. EDWARD ROSS
STEEFEL, LEVITT & WEISS
A Professional Corporation
One Embarcadero Center, 30th Fl.
San Francisco, California 94111
Telephone: (415) 788-0900
Counsel for Petitioner

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Entry Date	Event
2/17/89	Action Commenced;
2/23/89	First Amendment Complaint of Robert J. Pelletier For Constitutional Violations, Violation of the Administrative Procedure Act, Violation of the Privacy Act, Intentional Interference with Contractual Advantage and Inducement to Breach of Contract, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Negligence;
4/10/89	Ex Parte Application of John W. Behrens Asserting Immunity from Discovery Pending a Ruling on Immunity from Suit;
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4/19/89	Order of Magistrate Kronenberg Staying Discovery as to Defendant John W. Behrens Until There Has Been a Ruling by the Trial Judge on Defendant Behrens' Entitlement of Official Immunity from this Suit;
4/26/89	Objection of Robert J. Pelletier to Magistrate Kronenberg's 4/19/89 Order;
5/5/89	Memorandum of John Behrens in Opposition to Robert Pelletier's Objections to Magistrate's 4/19/89 Order;

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5/16/89	Notice of Motion and Motion of Defendant Behrens to Dismiss the First Amended Complaint or for Summary Judgment;
6/12/89	Opposition of Robert J. Pelletier to Motion of Defendant John W. Behrens to Dismiss or for Summary Judgment;
7/10/89	Reply Memorandum in Support of Defendant John W. Behrens' Motion to Dismiss the First Amended Complaint or For Summary Judgment;
7/18/89	Consolidated Rejoinders of Robert J. Pelletier to Reply Briefs of John W. Behrens, etc.;
8/8/89	Supplemental Memorandum in Support of Defendant John W. Behrens' Motion to Dismiss or for Summary Judgment;
8/15/89	Response of Robert J. Pelletier to Supplemental Memorandum of John W. Behrens to Dismiss or for Summary Judgment;
9/11/89	Order of District Judge Takasugi Vacating Magistrate Kronenberg's 4/19/89 Order Staying Discovery as to Defendant Behrens;
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3/14/90	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Wallace and Leavy Denying Appellant's Motion to Stay;
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4/4/91	[United States Court of Appeals Ninth Circuit] Argued and Submitted;
5/2/91	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge King (Remanding to District Court for Limited Purpose);
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1/6/92	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge King (Reinstating Appeal);
1/17/92	Order of District Judge Takasugi Denying Motion for Stay Pending Appeal (of Defendant Behrens);

1/24/92	[United States Court of Appeals Ninth Circuit] Motion of Appellant for a Stay of District Court Trial Proceedings Until This Court Issues a Ruling on the Immunity Issues in this Appeal;
1/28/92	[United States Court of Appeals Ninth Circuit] Supplemental Brief of Federal Appellant Behrens;
1/29/92	[United States Court of Appeals Ninth Circuit] Appellee Pelletier's Memorandum in Opposition to Appellant Behrens' Motion for Stay, etc.;
1/31/92	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge King (Staying Proceedings in District Court);
2/10/92	[United States Court of Appeals Ninth Circuit] Supplemental Brief of Appellee Robert J. Pelletier;
2/19/92	[United States Court of Appeals Ninth Circuit] Supplemental Reply Brief for Federal Appellant Behrens;
6/29/92	[United States Court of Appeals Ninth Circuit] Opinion, Pelletier v. Federal Home Loan, 968 F.2d 865;
8/12/92	[United States Court of Appeals Ninth Circuit] Petition for Panel Rehearing (by Appellant Behrens);
9/24/93	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge Kind (Denying Petition for Rehearing);

2/22/94	Notice of Motion and Motion of Plaintiff Robert J. Pelletier to Modify this Court's 10/6/91 Order in Light of Ninth Circuit Opinion and for Sanctions;
3/1/94	Defendant Behrens' Notice of Motion and Motion for Summary Judgment;
3/11/94	Stipulation Regarding Ninth Circuit Decision and [Proposed] Order Thereon;
3/14/94	Plaintiff Pelletier's Memorandum of Points and Authorities in Opposition to Defendant Behrens' Motion for Summary Judgment, etc.;
3/21/94	Reply to Plaintiff's Opposition to Defendant Behrens' Motion for Summary Judgment;
8/1/94	Order of District Judge Takasugi Continuing Pre-Trial Conference (to 12/5/94) and Trial (to 1/10/95);
9/6/94	Order of District Judge Takasugi re Motions to Extend Discovery Cutoff, Modify, Reconsider, and Strike, and for Summary Judgment and Clarification;
10/24/94	Defendant John W. Behrens' Notice of Appeal, etc. (from 9/7/94 Order);
10/27/94	Order of District Judge Takasugi Vacating Order of April 19, 1994, (and Notifying the Parties that the Court expected Compliance with Local Pre-Trial Conference Requirements);
10/31/94	Ex Parte Application of John W. Behrens for Order Vacating Order Entered on October 27, 1994;
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11/7/94	Order of District Judge Takasugi Certifying Appeal as Frivolous;
11/9/94	[United States Court of Appeals Ninth Circuit] Appellant John W. Behrens' Emergency Motion Under Circuit Rule 27-3 for Stay of Trial Court Proceedings Pending [Ninth Circuit]'s Disposition of Motion to Dismiss Appeal;
11/9/94	[United States Court of Appeals Ninth Circuit] Motion of Plaintiff and Appellee Robert J. Pelletier to Dismiss Appeal and for Award of Sanctions;
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PLAINTIFF'S FIRST AMENDED COMPLAINT, EOD FEBRUARY 23, 1989*

ORIGINAL

REBECCA BONANNO MOCCIARO, a P.C.
SAMUEL T. REES, a P.C.
LEFF KATZ REES & MOCCIARO
Forty-First Floor
355 South Grand Avenue
Los Angeles, California 90071-3101
(213) 621-2000

Attorneys for Plaintiff
ROBERT J. PELLETIER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN W. BEHRENS; FEDERAL HOME LOAN BANK BOARD; and UNITED STATES OF AMERICA, Defendants.	Case No. CV 89-0969 WJR (KX) FIRST AMENDED COMPLAINT OF ROBERT J. PELLETIER FOR: CONSTITUTIONAL VIOLATIONS; VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT; VIOLATION OF THE PRIVACY ACT; INTENTIONAL INTERFERENCE WITH CONTRACTUAL ADVANTAGE AND INDUCEMENT TO BREACH OF CONTRACT; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were left intentionally to show accurately how the original documents appeared.

) NEGLIGENT INFLICTION
) OF EMOTIONAL DISTRESS;
) NEGLIGENCE
)
) DEMAND FOR JURY TRIAL
)

Robert J. Pelletier ("Pelletier"), alleges as follows:

GENERAL ALLEGATIONS

1. Pelletier is an individual presently residing in Riverside County, California, and formerly residing in Orange County, California during the time when many of the allegations set forth in this Complaint occurred. Pelletier has been named as a defendant by the Federal Savings and Loan Insurance Corporation ("FSLIC") in actions arising following the FSLIC's placement of Beverly Hills Savings and Loan Association into a Federal receivership. Those actions are pending before Judge Takasugi in Case No. CV 88-00651 RMT (Tx), as removed and amended, and in FSLIC's complaint for damages Case No. CV 86-6780-RMT (Tx) (collectively the "FSLIC Actions").

2. Defendant Federal Home Loan Bank Board is an agency of the Executive Branch of Defendant United States of America (collectively the "Bank Board").

3. Defendant Federal Home Loan Bank of San Francisco ("FHLBSF") is incorporated under and pursuant to the laws of the United States of America and has its principal place of business in San Francisco, California. Pelletier is informed and believes and on that basis alleges that at times material hereto FHLBSF acted as an agent, servant or representative of the Bank Board.

4. Defendant John W. Behrens ("Behrens") is an officer or employee of the FHLBSF. Pelletier is informed and

believes and on that basis alleges that Behrens resides in or about Solano County, California.

5. Jurisdiction exists by virtue of 28 U.S.C. § 1331; 5 U.S.C. § 552a(g)(1); 5 U.S.C. § 702; 12 U.S.C. §§ 1431 and 1437, and 28 U.S.C. §§ 2201 and 2202, and pendant jurisdiction.

6. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391.

7. At times material to the allegations of this Complaint, Pelletier is informed and believes and on that basis alleges, that in performing the acts alleged in this Complaint Behrens acted either individually or as the agent, servant, employee and/or representative of FHLBSF, of the Bank Board, of the Federal Savings and Loan Insurance Corporation (the "FSLIC"), or of two or more of these entities, in the course and scope of such relationships.

8. Pelletier is informed and believes and on that basis alleges that in performing the actions alleged in this Complaint, the FHLBSF, the Bank Board, and the FSLIC were, at various, undefined, but relevant times, acting as the agents of one another, and were acting within the course and scope of that relationship.

9. Pelletier has pursued a profession and held employment in the savings and loan industry in various executive positions for over thirty years. Commencing in 1980, Pelletier was an officer of Beverly Hills Savings and Loan Association ("BHSL"). He remained at BHSL until March of 1984. For much of his term of employment at

BHSL, Pelletier served as head of the Major Loan Division of BHSL. The Major Loan Division was responsible only for the origination, processing, and closing of income property loans (commercial and industrial real estate loans).

10. Pelletier was also a member of the Senior Loan Committee. As a member of the Senior Loan Committee, he reviewed, evaluated and approved various types of loans then being made by BHSL in dollar amounts which were in excess of limitations and criteria promulgated and approved by the BHSL Board of Directors and its legal advisors. Pelletier is informed and believes and on that basis alleges that all loans which he approved while a member of the Senior Loan Committee met the criteria set forth by the Board and its advisors.

11. Pelletier was never a member of the BHSL Board of Directors.

12. In March of 1984, Pelletier was instructed by BHSL to relocate his office from BHSL's Mission Viejo Administrative Headquarters in Orange County, California to BHSL's Corporate Headquarters in Beverly Hills, approximately 50 miles to the north. Pelletier was not inclined to make such a move since most of his professional and personal contacts were centered in Orange County.

13. Approximately two weeks after BHSL advised Pelletier of the proposed transfer, Pelletier met with the BHSL CEO to discuss the matter. At that time, Pelletier advised the CEO that he had decided to voluntarily resign his position rather than agree to the relocation.

14. Following this voluntary withdrawal from BHSL in mid-1984, Pelletier became employed as managing officer at Equitable Savings and Loan Association, also in Orange County. At the time, Equitable was being operated under the supervision of the FHLBSF.

15. Pelletier's employment as managing officer at Equitable was approved by the FHLBSF, by and through its agents, and by the California Department of Savings and Loan.

16. Pelletier was employed as managing officer at Equitable until Equitable's management decided to transfer its main offices to Northern California. Pelletier again declined such relocation, and resigned his position at Equitable.

17. Subsequently, Pelletier was hired as President of Pioneer Savings and Loan Association. Once again, Pelletier's work was well-received by FHLBSF and State regulators. Pelletier's work was also well-received by Pioneer's owners, as well as by the independent accounting firm of Peat, Marwick, Mitchell & Company.

18. Pioneer was required, however, to obtain the approval of its employment of Pelletier as President by the FHLBSF. The FHLBSF delayed giving Pelletier its approval or disapproval for a material period of time.

19. During the time period that Pelletier was at Pioneer, Pelletier voluntarily met with regulators and others investigating the problems that had ultimately surfaced at BHSL. Pelletier met on many occasions with

regulators and their counsel, and travelled back to Washington, D.C., to provide them with facts regarding Pelletier's division and the Senior Loan Committee.

20. Pelletier was told by those regulators with whom he met that no action would be taken to prejudice his employment with Pioneer until after the FSLIC investigation had been completed.

21. In May of 1986, Behrens sent a letter (the "Behrens Directive") to Pioneer's Board of Directors directing the Board to terminate Pelletier as its President. Following its receipt of the Behrens Directive, Pioneer's Board of Directors told Pelletier that Pioneer was under direction from the FHLBSF to terminate and replace him. When Pelletier refused the Board's request that he voluntarily resign, the Board of Directors of Pioneer terminated him. Prior to the Behrens Directive, no one from Defendant FHLBSF, nor Defendant Behrens, ever advised Pelletier that his employment with Pioneer was in jeopardy.

22. The first of the FSLIC Actions naming Pelletier was not filed until November of 1986, or six months after the Behrens Directive was issued.

23. Pelletier has exhausted all administrative remedies available to him. Defendants have denied Pelletier any administrative remedy, in spite of his efforts to obtain such a remedy. Defendants failed to hold any administrative hearings or even discuss with Pelletier the reasons for the Behrens Directive. Defendants have not provided Pelletier with any further explanation regarding the reasons behind the Behrens Directive. Defendants refused and failed to afford Pelletier with any meaningful opportunity to be heard regarding the charges against

him, and have not allowed Pelletier the opportunity to clear his name. Defendants have refused and failed to act in compliance with their own internal investigatory procedures to provide Pelletier with a full and fair hearing and investigation into his claims.

24. Since his termination by Pioneer at the direction of the Defendants, Pelletier, a man in his prime earning years, has been unable to secure other employment in the savings and loan and the financial institutions industries. Several senior level jobs have been tentatively offered to him only to be withdrawn after learning of the Behrens Directive and its impact upon Pelletier's employment at Pioneer.

25. Pelletier is informed and believes and on that basis alleges that Defendants, and each of them, have made and continue to make a concerted effort to prevent Pelletier from securing employment in the financial institutions industry.

26. Pelletier is informed and believes and on that basis alleges that the Defendants have acted in concert with each other, and with others, and have prevented and continue to prevent him from securing any gainful employment in the savings and loan and related financial institutions industries.

27. Defendants' actions have created, and continue to create, a false and damaging impression about Pelletier in the savings and loan industry with respect to Pelletier's abilities, his performance and his honesty.

28. Pelletier is informed and believes and on that basis alleges that no other officer or director of BHSL has

lost his employment or professional career because of regulatory action and no other BHSL officer or director has been the subject of any order similar to the Behrens Directive. Pelletier is further informed and believes and on that basis alleges that others named by the FSLIC in their action arising out of the BHSL seizure in fact were retained as employees of BHSL through 1988.

FIRST CLAIM FOR DENIAL OF DUE PROCESS

29. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28 of his General Allegations.

30. This is a claim for damages and equitable relief for Defendants' violations of Pelletier's Constitutional and statutory due process rights.

31. In issuing the Behrens Directive, Defendants failed to afford Pelletier his procedural due process rights to have a pre- or post-termination hearing or have any impartial hearing regarding the Defendants' allegations and failed to permit Pelletier the opportunity to refute any claims or adverse information against him, all in violation of his Constitutional and civil rights, as well as procedural rights afforded to him under and pursuant to the regulations and statutes applicable to the Defendants' exercise of their regulatory and investigative duties.

32. Defendants arbitrarily and capriciously acted in violation of Pelletier's due process rights as guaranteed by the Fifth Amendment to the United States Constitution and pertinent statutes by acting in each and all of the

following ways, *inter alia:*, (a) directing Pioneer to terminate Pelletier's employment at Pioneer without meaningfully and thoroughly investigating Pelletier's involvement with BHSL and his performance at Pioneer; (b) failing to interview knowledgeable witnesses; (c) refusing to provide Pelletier with any opportunity to refute before an impartial tribunal any adverse information against him; (d) relying on false information; (e) refusing to allow Pelletier any opportunity to confront the witnesses, if any exist, who provided evidence against him, and to examine any documents, if any exist, containing evidence adverse to him; (f) failing to allow Pelletier any appeal rights regarding the actions taken against him; and (g) continuing to act adversely to Pelletier in spite of their disregard of his procedural due process rights.

33. In acting as hereinabove alleged, Defendants violated Pelletier's procedural due process rights as guaranteed by the Fifth Amendment to the United States Constitution. In addition, Defendants' conduct has also deprived Pelletier of his statutory rights established in, *inter alia*, 12 U.S.C. § 1730(g) and 1464(d).

34. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

35. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's Constitutional and statutory rights.

SECOND CLAIM FOR VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS

36. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, and paragraphs 31 through 34, of his Complaint.

37. This is a claim for damages and equitable relief for Defendants' violations of Pelletier's Constitutional liberty and property rights.

38. As a direct and proximate result of Defendants' actions as hereinabove alleged, Pelletier has been deprived, and continues to be deprived, of clearly established and Constitutionally protected property and liberty rights including, without limitation, his rights to specific employment and to pursue his profession free from undue governmental interference. Pelletier, as a direct and proximate result of Defendants' actions, has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

39. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's constitutional rights.

THIRD CLAIM FOR VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

40. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34 and 38 of this Complaint.

41. This is a claim for damages and equitable relief for Defendants' violations of the Administrative Procedure Act.

42. In failing to perform a careful and diligent investigation of Pelletier's qualifications, Defendants' actions were unconstitutional, arbitrary, capricious, and an abuse of their lawful discretion in violation of 5 U.S.C. § 701-706 (the Administrative Procedure Act ("APA")), 12 U.S.C. § 1730(b), (e) and (g) (the National Housing Act), 12 U.S.C. § 1464(d) (the Home Owners Loan Act), and related federal regulations.

43. Pelletier has sought to exercise his administrative remedies under the APA but Defendants have refused to respond in any way to his effort and have thereby denied him any administrative remedy.

44. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

45. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's rights under and pursuant to the APA.

FOURTH CLAIM FOR VIOLATION OF 5 U.S.C. § 552a (THE PRIVACY ACT)

46. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, and 42 through 44 of his Complaint.

47. This is a claim for damages and equitable relief for Defendants' violations of the Privacy Act.

48. In failing and refusing to compile and maintain records concerning Pelletier with such accuracy, relevance, timeliness, and completeness as necessary to assure fairness in the determination of Pelletier's qualifications, character, rights, and the opportunities of, and benefits of, Third-Party Defendants have violated 5 U.S.C. § 552a(g)(1)(B) and (C) and (g)(4) of the Privacy Act (5 U.S.C. § 552a et seq.). These failures and refusals are ongoing.

49. Pelletier has sought to exercise his administrative remedies but in all efforts rebuffed and he has been denied any remedy by Defendants.

50. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

51. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's rights under and pursuant to the Privacy Act.

FIFTH CLAIM FOR INTERFERENCE WITH CONTRACTUAL RIGHTS AND INDUCING BREACH OF CONTRACT

52. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44 and 48 through 50 of his Complaint.

53. This is a pendant state tort claim for interference with contractual rights and and prospective advantage.

54. Prior to May 6, 1986, Pelletier had entered into an employment contract with Pioneer whereby Pelletier

agreed to serve as President and Managing Officer for Pioneer, and Pioneer agreed to pay to Pelletier compensation for Pelletier's work in those capacities.

55. Pelletier and Pioneer in fact performed in accordance with their contractual obligations, until Pioneer received the Behrens Directive from Defendants dated May 6, 1986.

56. At all relevant times, Defendants had full knowledge of the employment contract between Pelletier and Pioneer. In spite of such knowledge, without good cause therefore, and with specific intent to interfere with the contractual relationship between Pelletier and Pioneer, Defendants induced and wrongfully caused Pioneer to terminate Pelletier and to disaffirm and deny to Pelletier all rights under the employment contract.

57. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional pain and suffering, stigma, and damage to his reputation.

58. Defendants' intentional acts of interference and inducing Pioneer to breach its employment contract with Pelletier at all times were willful, malicious and in bad faith.

SIXTH CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

59. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 of his Complaint.

60. This is a pendant state tort claim for intentional infliction of emotional distress.

61. The conduct of, *inter alios,* Defendant Behrens was malicious and intentional and done for the purpose of causing Pelletier to suffer humiliation, mental anguish, and emotional and physical distress. Defendants' conduct was done with the knowledge that Pelletier's emotional and physical distress would thereby increase and was done with a wanton and reckless disregard of the consequences to Pelletier.

62. As the proximate result of the aforementioned acts, Pelletier suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind and body.

63. The aforementioned acts of Defendants were wilful, wanton, malicious, and oppressive and justify the awarding of exemplary and punitive damages.

SEVENTH CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

64. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 of this Complaint.

65. This is a pendant state tort claim for negligent infliction of emotional distress.

66. In acting as alleged above, Defendants failed to exercise due care. Defendants knew or should have known that their failure to exercise due care in acting as

alleged above would cause Plaintiff severe emotional distress.

67. As a proximate result of Defendants' breaches of their duty of due care to Pelletier, they caused Pelletier to suffer humiliation, mental anguish, and emotional and physical distress.

68. As the proximate result of the aforementioned acts, Pelletier suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind and body.

EIGHTH CLAIM FOR NEGLIGENCE

69. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, 54 through 57, and 66 of this Complaint.

70. This is a claim for relief for Defendants' negligence which has caused Pelletier injury.

71. By acting as set forth above, Defendants, and each of them, failed and neglected to exercise due care and diligence in performing their duties and obligations to Pelletier.

72. By acting as set forth above, Defendants and each of them were negligent and grossly negligent and breached their duties and obligations under state and federal law to Pelletier.

73. As a proximate result of such negligence and gross negligence, Pelletier has suffered damages in an amount that is not yet fully ascertained but which is in

excess of $50,000. Pelletier will seek leave to amend this Complaint to state the amount of these damages as soon as they are determined with sufficient certainty and, if appropriate, to specify with more particularity the extent to which each of the Defendants is responsible for the particular items of damages suffered by Pelletier.

74. In committing the acts and omissions alleged above, Defendants acted with a conscious and reckless disregard for Pelletier. Therefore, in addition to actual damages, and to the extent available against any given Defendant, Pelletier is entitled to recover punitive damages from Defendants, as appropriate, in the amount of $10 million for the purpose of punishing those Defendants and deterring them from engaging in such outrageous actions in the future.

WHEREFORE, Pelletier respectfully prays that upon final hearing, this Court:

1. Issue a declaration that Defendants' actions deprived Pelletier of property and liberty interests in violation of Pelletier's substantive and procedural due process rights as guaranteed by the Fifth Amendment to the United States Constitution;

2. Issue a declaration that Defendants' actions were arbitrary and capricious and violated Pelletier's rights under the Administrative Procedure Act, the Privacy Act, the Homeowners Loan Act, and the National Housing Act;

3. Issue preliminary and permanent injunctive relief prohibiting Defendants from interfering in any way with Pelletier's efforts to find and hold employment;

4. Issue preliminary and permanent injunctive relief mandating that Defendants grant Pelletier an opportunity to examine, confront and refute any allegations, evidence and witnesses against him, and further, mandating that Defendants hold a name clearing hearing for Pelletier, and further, prohibiting Defendants from further interfering with Pelletier's rights to confront his accusers and obtain a fair, impartial and due process hearing on Defendants' allegations against him;

5. Award Pelletier actual and exemplary damages, as appropriate in accordance with the applicable federal and state laws, for each of his claims as appropriate;

6. Award Pelletier attorneys' fees and costs, as appropriate; and

7. Award Pelletier such other and further relief as this Court may deem just and proper.

DATED: February 23, 1989

REBECCA BONANNO MOCCIARO,
a P.C.
SAMUEL T. REES, a P.C.
LEFF KATZ REES & MOCCIARO

By: /s/ Rebecca B. Mocciaro
Rebecca Bonanno Mocciaro
Attorneys for Plaintiff
ROBERT J. PELLETIER

DEMAND FOR JURY TRIAL

Please take notice that plaintiff Robert J. Pelletier hereby demands trial by jury.

DATED: February 23, 1989

REBECCA BONANNO MOCCIARO,
a P.C.
SAMUEL T. REES, a P.C.
LEFF KATZ REES & MOCCIARO

By: /s/ Rebecca B. Mocciaro
Rebecca Bonanno Mocciaro
Attorneys for Plaintiff
ROBERT J. PELLETIER

DISTRICT COURT'S ORDER VACATING ORDER STAYING DISCOVERY, EOD SEPTEMBER 11, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-0969-RMT(Kx) ORDER VACATING MAGISTRATE'S ORDER STAYING DISCOVERY (Filed Sep. 11, 1989)

This matter has come before the court on the objections of plaintiff to Magistrate Kronenberg's April 19, 1989 order on ex parte application of defendant Behrens for immunity from discovery. Having considered the pleadings and other documents filed herein, the court has determined that although defendant Behrens may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented. Accordingly,

IT IS ORDERED that Magistrate Kronenberg's April 19, 1989 order staying discovery as to defendant Behrens is hereby vacated.

Dated: September 11, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

DISTRICT COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS, EOD OCTOBER 5, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-969-RMT(Kx) ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS (Filed Oct. 5, 1989)

This matter has come before the court on the following motions:

(1) Motion by defendant Federal Home Loan Bank Board ("FHLBB") to dismiss the first amended complaint,

(2) Motion by defendant United States of America to dismiss the first amended complaint,

(3) Motion by defendant Federal Home Loan Bank of San Francisco ("FHLB-SF") to dismiss the first amended complaint, and

(4) Motion by defendant John W. Behrens to dismiss the first amended complaint or for summary judgment.

Having considered the pleadings and other documents filed herein, the court has determined the following:

1. The statute of limitations for a *Bivens* claim, intentional infliction of emotional distress, and negligent infliction of emotional distress is one year;

2. Sovereign immunity bars a *Bivens* claim against the U.S.A. and the FHLBB;

3. Injunctive relief is available under the Administrative Procedure Act; monetary relief is not;

4. A Privacy Act claim is only authorized against a government agency;

5. A federal agency, such as the FHLBB is not a proper party defendant to a Federal Tort Claims Act ("FTCA") claim;

6. Claims arising out of interference with contract rights are excluded by the FTCA; and

7. Given the status of discovery herein, it is premature for the court to consider defendant Behrens' motion for summary judgment.

Accordingly,

IT IS ORDERED that the motions to dismiss are granted in part and denied in part as follows:

1. As to the first and second causes of action alleging *Bivens* claims,

> (a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged

subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment, and

(b) The motions to dismiss of defendants FHLBB and U.S.A. are granted, as barred by sovereign immunity.

2. As to the third cause of action alleging an Administrative Procedure Act claim, the motions to dismiss of all defendants is granted to the extent plaintiff seeks monetary relief and denied to the extent plaintiff seeks injunctive relief.

3. As to the fourth cause of action alleging a Privacy Act claim,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are granted, and

(b) The motions to dismiss of defendants FHLBB and U.S.A. are denied.

4. As to the fifth cause of action alleging intentional interference with contractual rights and inducing breach of contract,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are denied;

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim; and

(c) The motion to dismiss of defendant U.S.A. is granted, as this claim is excluded from the FTCA.

5. As to the sixth and seventh causes of action alleging intentional and negligent infliction of emotional distress,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment,

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim, and

(c) The motion to dismiss of defendant U.S.A. is denied.

6. As to the eighth cause of action alleging a negligence claim,

(a) The motions to dismiss of defendants Behrens, FHLB-SF and U.S.A. are denied, and

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim.

7. The alternative motion of defendant Behrens for summary judgment is denied without prejudice.

Dated: October 5, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

DEFENDANT'S ANSWER, EOD OCTOBER 30, 1989

STUART GERSON
Assistant Attorney General
Civil Division
GARY A. FEESS
United States Attorney
ROGER E. WEST
Assistant United States Attorney
Assistant Chief, Civil Division
NICKI L. KOUTSIS
Acting Director, Torts Branch
LARRY L. GREGG
Senior Trial Counsel, Torts Branch
ELIZABETH R. MOORE
Trial Attorney, Torts Branch
Civil Division
UNITED STATES DEPARTMENT OF JUSTICE
601 D Street, N.W.
P.O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-5716

Attorneys for Defendant
John W. Behrens

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. **FEDERAL HOME LOAN BANK of SAN FRANCISCO,** et al., Defendants.	No. CV 89-0969 RMT (Kx) **DEFENDANT JOHN W. BEHRENS' ANSWER TO FIRST AMENDED COMPLAINT**

Defendant John W. Behrens, in his individual capacity, for his answer to the First Amended Complaint ("Complaint"), hereby states as follows.

First Defense

The Complaint fails to state a claim against Behrens upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of this action.

Third Defense

The Complaint is barred by the statute of limitations.

Fourth Defense

Insofar as plaintiff seeks equitable relief, the Complaint cannot be maintained against Behrens personally.

Fifth Defense

Behrens is absolutely and qualifiedly immune from personal liability for monetary damages.

Sixth Defense

The exclusive remedy for the injuries and/or damages alleged in the Complaint lies against the United States, not against Behrens personally.

Seventh Defense

The injuries and/or damages alleged in the Complaint were not proximately caused by a negligent or wrongful act or omission of Behrens.

Eighth Defense

The injuries and/or damages alleged by the plaintiff were proximately caused by the intervening or superseding act of one other than Behrens.

Ninth Defense

At all times relevant to the acts alleged in the Complaint, Behrens acted in good faith and with a reasonable belief in the lawfulness of his acts.

Tenth Defense

Behrens' actions were privileged.

Eleventh Defense

Behrens owed no duty to plaintiff.

Twelfth Defense

Behrens breached no duty owed to plaintiff.

Thirteenth Defense

The injuries and/or damages alleged in the Complaint were caused by plaintiff himself.

Fourteenth Defense

The Complaint is barred by laches.

Fifteenth Defense

The Complaint is barred by plaintiff's contributory negligence.

Sixteenth Defense

The Complaint is barred by plaintiff's comparative negligence.

Seventeenth Defense

Plaintiff failed to mitigate his damages.

Eighteenth Defense

Plaintiff cannot recover for the injuries and/or damages alleged in the Complaint because of his unclean hands.

Nineteenth Defense

Behrens answers the numbered paragraphs of the Complaint as follows using the same paragraph numbers:

1. Admits on information and belief that Robert J. Pelletier is an individual who has been named as a defendant in two lawsuits being pursued by the Federal Savings and Loan Insurance Corporation ("FSLIC") based on Pelletier's involvement in the collapse of Beverly Hills Savings & Loan Association ("BHSL"). Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of this paragraph, and therefore denies the same.

2. Admits to the extent consistent with the statutes creating the Federal Home Loan Bank Board ("Bank Board").

3. Admits the first sentence to the extent it is consistent with law; otherwise, denies. Denies the second sentence.

4. As to the first sentence, admits that at relevant times and until the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, Behrens was an employee of the Federal Home Loan Bank of San Francisco ("FHLB-SF"). Admits the second sentence.

5. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

6. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

7. Admits that at all relevant times, Behrens acted as the agent, servant, employee and representative of the Bank Board and/or of the FSLIC, in the course and scope of such relationships; otherwise denies.

8. Denies.

9. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

10. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

11. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

12. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

13. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the

allegations in this paragraph, and therefore denies the same.

14. Denies specifically that Equitable Savings and Loan Association was operated under the supervision of the FHLB-SF. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore denies the same.

15. Denies specifically that plaintiff's employment as managing officer of Equitable Savings and Loan Association was approved by the FHLB-SF and/or its agents. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore denies the same.

16. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

17. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

18. Denies.

19. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

20. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the

allegations in this paragraph, and therefore denies the same.

21. As to the first sentence, admits that on May 8, 1986, acting in his capacity as Supervisory Agent of Pioneer Savings & Loan Association ("Pioneer"), Behrens sent a letter to Pioneer's board of directors; denies the remaining allegations of the first sentence. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore denies the same.

22. Denies.

23. As to the first sentence, avers that this sentence contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies. As to the third sentence, admits that no formal adversarial hearing was held in connection with the May 8, 1986, letter to Pioneer, but denies the implication that plaintiff was entitled to such a hearing; and denies the remainder of this sentence. Denies all the remaining allegations of this paragraph.

24. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

25. Denies.

26. Denies.

27. Denies.

28. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the

allegations in this paragraph, and therefore denies the same.

29. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28 above.

30. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

31. Denies.

32. Denies.

33. Denies.

34. Denies.

35. Denies.

36. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28 and 31 through 34 above.

37. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

38. Denies.

39. Denies.

40 through 51. These paragraphs require no answer because they relate to claims against Behrens which have been dismissed by the court's order of October 6, 1989; but insofar as an answer may be deemed required, denies.

52. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, and 48 through 50 above.

53. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

54. Denies.

55. Denies.

56. Denies.

57. Denies.

58. Denies.

59. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 above.

60. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

61. Denies.

62. Denies.

63. Denies.

64. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 above.

65. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

66. Denies.

67. Denies.

68. Denies.

69. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, 54 through 57, and 66 above.

70. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

71. Denies.

72. Denies.

73. Denies.

74. Denies.

Behrens denies all of plaintiff's prayers for relief.

Behrens hereby specifically denies each and every allegation of the Complaint not otherwise answered above.

Behrens demands a jury trial on all issues.

WHEREFORE, having fully answered, Behrens prays that the plaintiff take nothing, that the First Amended Complaint be dismissed with prejudice, and that the Court grant judgment in favor of Behrens and award him

the costs of this action, and make such other orders as may be just and appropriate.

Respectfully submitted,

STUART GERSON
Assistant Attorney General

GARY A. FEESS
United States Attorney

ROGER E. WEST
Assistant United States Attorney
Assistant Chief, Civil Division

NICKI L. KOUTSIS
Acting Director, Torts Branch

LARRY L. GREGG
Senior Trial Counsel, Torts Branch

/s/ Elizabeth R. Moore
ELIZABETH R. MOORE
Trial Attorney, Torts Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W.
P.O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

Telephone: (202) 724-5716

Attorneys for Defendant
John W. Behrens

[Certificate Of Service Omitted In Printing]

DEFENDANT'S NOTICE OF APPEAL, EOD NOVEMBER 2, 1989

STUART M. GERSON
Assistant Attorney General
Civil Division
GARY A. FEESS
United States Attorney
ROGER E. WEST
Assistant United States Attorney
Assistant Chief, Civil Division
NICKI L. KOUTSIS
Acting Director, Torts Branch
LARRY L. GREGG
Senior Trial Counsel, Torts Branch
ELIZABETH R. MOORE
Trial Attorney, Torts Branch
Civil Division
UNITED STATES DEPARTMENT OF JUSTICE
P.O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

Telephone: (202) 724-5716

Attorneys for Defendant
John W. Behrens

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. **FEDERAL HOME LOAN BANK of SAN FRANCISCO, et al.,** Defendants.	No. CV 89-0969 RMT (Kx) **DEFENDANT JOHN W. BEHRENS' NOTICE OF APPEAL**

Notice is hereby given that John W. Behrens, defendant in this action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's orders (a) permitting discovery to proceed and (b) denying in part Behrens' motion to dismiss or for summary judgment. Copies of the two orders appealed from, which were entered in this action on September 11, 1989, and October 6, 1989, respectively, are attached.

In accordance with Local Rule 17, Behrens hereby advises the Court that the other parties to this action and their counsel of record are as follows:

Plaintiff Robert J. Pelletier

Counsel: Rebecca Bonanno Mocciaro
Leff Katz Rees & Mocciaro
Forty-First Floor, Suite 4110
355 South Grand Avenue
Los Angeles, CA 90071-3101

Defendant Federal Home Loan Bank of San Francisco

Counsel: Thomas V. Loran
Pillsbury, Madison & Sutro
225 Bush Street
P.O. Box 7880
San Francisco, CA 94120

and

Sybil Malinowski
Associate Counsel
Federal Home Loan Bank of San Francisco
One Montgomery Street
P.O. Box 7948
San Francisco, CA 94120-7948

Defendant Office of Thrift Supervision (formerly the Federal Home Loan Bank Board)

Counsel: Steven W. Dimmick
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Defendant The United States of America

Counsel: Nikki Calvano
United States Department of Justice
Civil Division, Torts Branch
P.O. Box 888
Benjamin Franklin Station
Washington, D.C. 20044

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

GARY A. FEESS
United States Attorney

ROGER E. WEST
Assistant United States Attorney
Assistant Chief, Civil Division

NICKI L. KOUTSIS
Acting Director, Torts Branch

LARRY L. GREGG
Senior Trial Counsel, Torts Branch

/s/ Elizabeth R. Moore
ELIZABETH R. MOORE
Trial Attorney, Torts Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W.
P.O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

Telephone: (202) 724-5716

Attorneys for Defendant
John W. Behrens

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-0969-RMT(Kx) ORDER VACATING MAGISTRATE'S ORDER STAYING DISCOVERY (Filed September 11, 1989)

This matter has come before the court on the objections of plaintiff to Magistrate Kronenberg's April 19, 1989 order on ex parte application of defendant Behrens for immunity from discovery. Having considered the

pleadings and other documents filed herein, the court has determined that although defendant Behrens may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented. Accordingly,

IT IS ORDERED that Magistrate Kronenberg's April 19, 1989 order staying discovery as to defendant Behrens is hereby vacated.

Dated: September 11, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-969-RMT(Kx) ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS (Filed October 5, 1989)

This matter has come before the court on the following motions:

(1) Motion by defendant Federal Home Loan Bank Board ("FHLBB") to dismiss the first amended complaint,

(2) Motion by defendant United States of America to dismiss the first amended complaint,

(3) Motion by defendant Federal Home Loan Bank of San Francisco ("FHLB-SF") to dismiss the first amended complaint, and

(4) Motion by defendant John W. Behrens to dismiss the first amended complaint or for summary judgment.

Having considered the pleadings and other documents filed herein, the court has determined the following:

1. The statute of limitations for a *Bivens* claim, intentional infliction of emotional distress, and negligent infliction of emotional distress is one year;

2. Sovereign immunity bars a *Bivens* claim against the U.S.A. and the FHLBB;

3. Injunctive relief is available under the Administrative Procedure Act; monetary relief is not;

4. A Privacy Act claim is only authorized against a government agency;

5. A federal agency, such as the FHLBB is not a proper party defendant to a Federal Tort Claims Act ("FTCA") claim;

6. Claims arising out of interference with contract rights are excluded by the FTCA; and

7. Given the status of discovery herein, it is premature for the court to consider defendant Behrens' motion for summary judgment.

Accordingly,

IT IS ORDERED that the motions to dismiss are granted in part and denied in part as follows:

1. As to the first and second causes of action alleging *Bivens* claims,

> (a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment, and
>
> (b) The motions to dismiss of defendants FHLBB and U.S.A. are granted, as barred by sovereign immunity.

2. As to the third cause of action alleging an Administrative Procedure Act claim, the motions to dismiss of all defendants is granted to the extent plaintiff seeks monetary relief and denied to the extent plaintiff seeks injunctive relief.

3. As to the fourth cause of action alleging a Privacy Act claim,

> (a) The motions to dismiss of defendants Behrens and FHLB-SF are granted, and

(b) The motions to dismiss of defendants FHLBB and U.S.A. are denied.

4. As to the fifth cause of action alleging intentional interference with contractual rights and inducing breach of contract,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are denied;

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim; and

(c) The motion to dismiss of defendant U.S.A. is granted, as this claim is excluded from the FTCA.

5. As to the sixth and seventh causes of action alleging intentional and negligent infliction of emotional distress,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment,

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim, and

(c) The motion to dismiss of defendant U.S.A. is denied.

6. As to the eighth cause of action alleging a negligence claim,

(a) The motions to dismiss of defendants Behrens, FHLB-SF and U.S.A. are denied, and

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim.

7. The alternative motion of defendant Behrens for summary judgment is denied without prejudice.

Dated: October 5, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

[Certificate Of Service Omitted In Printing]

DEFENDANT/APPELLANT'S MOTION FOR STAY, EOD FEBRUARY 5, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER Plaintiff-Appellee v. FEDERAL HOME LOAN BANK BOARD Defendants, and JOHN W. BEHRENS Defendant-Appellant.	)	No. 89-56265

MOTION OF THE APPELLANT FOR A STAY OF DISTRICT COURT ORDERS PENDING APPEAL TO THIS COURT

Pursuant to Rules 8 and 27, Federal Rules of Appellate Procedure, and Rule 7(h) of this Court, the appellant, John W. Behrens, a Supervisory Agent of the Federal Home Loan Bank Board ("Board") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), respectfully requests a stay of the orders of the district court entered on September 11, 1989 and October 6, 1989, pending appeal to the Ninth Circuit.

The lower court orders, which are attached to this motion, require Mr. Behrens to submit to discovery and trial in his qualified immunity case, even though an

appeal of the lower court's denial of qualified immunity is now before this Court.[1] Further, the orders deny the absolute statutory right of the United States to be substituted for Mr. Behrens as defendant on those counts sounding in common law tort. Substitution is mandated by the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679 ("Westfall Act").

The district court has refused to stay its orders, pending appeal to this Court.[2] If not stayed by this Court, Mr. Behrens will be irreparably harmed. The Supreme Court explained in *Butz v. Economou*, 438 U.S. 478 (1975), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), that qualified immunity is intended to protect government officials, not only from adverse money judgments, but from the burdens and distractions of both discovery and trial. To ensure that the burdens of litigation are not imposed upon individuals claiming qualified immunity, the decision of a trial court denying such immunity is immediately appealable, under the *Cohen* collateral order doctrine. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1984); *Manhattan Beach Police Officers Association, Inc. v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989). If an official must undergo discovery and trial, even though he has appealed the immunity issue to a higher court, the protections of the immunity defense

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[1] The appellant's brief is due to be filed on or before February 20, 1990.

[2] A copy of the district court order denying a stay pending appeal, and a copy of the appellants, notice of appeal, are attached to this motion.

will have been irreparably lost. Accordingly, this Court has expressly held that "until the threshold issue of immunity is resolved, discovery should not proceed." *Di Martini v. Ferrin*, 889 F.2d 922, 926 (9th Cir. 1989); see also, *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989).

Indeed, because of the importance of preserving the immunity defense in the face of pending discovery and trial, the Seventh Circuit has held that appeal of an immunity issue *automatically stays* further proceedings in the trial court. *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989).

Additional irreparable harm will befall Mr. Behrens from the failure to substitute the United States as defendant on the common law tort counts, as required by law. Absent a stay the common law counts will proceed to trial against Mr. Behrens. Congress clearly intended the opposite result when, by enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679, it mandated that the United States be substituted for federal employees sued for the alleged commission of common law torts, and that the case then proceed against the United States, under the Federal Tort Claims Act ("FTCA").

STATEMENT

A. Background

On March 17, 1984, the Federal Home Loan Bank Board adopted Formal Resolution 84-126, designating the defendant John Behrens a Supervisory Agent, hence an

agent of the Board and of the FSLIC.[3] Behrens became responsible for supervising federally insured savings and loan institutions in the San Francisco district to insure compliance with law.[4]

The plaintiff, Robert J. Pelletier, was the president-designate of Pioneer Savings & Loan Association. Because Pioneer was a so-called "de novo" savings and loan (an institution in operation less than three years at the time it applied for FSLIC insurance, see 12 C.F.R. 571.6(b)), Pioneer was required to obtain approval of its new president-designate from Supervisory Agent Behrens.

This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan

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[3] These two agencies were recently abolished by enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. The functions of these agencies were transferred to several newly created agencies, including the Office of Thrift Supervision and the Resolution Trust Corporation. These changes have no direct effect on this lawsuit. Accordingly, we refer to the agencies as they existed at the time of the incidents charged in the complaint.

[4] Under 12 U.S.C. 1437(a) the Bank Board may delegate its functions, or the functions of the FSLIC, to "any officer, employee, agent, or administrative unit [of the Board]." The delegation of authority is formally carried out by the "Principal Supervisory Agent," 12 C.F.R. 501.10, and those who are delegated these powers are denominated "Supervisory Agents." Board regulations expressly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent, shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." *Id.*

officer and head of the bank's Major Loan Division, turned up wrongdoing at that bank. These problems were so serious that Behrens sent a letter to Pioneer advising that because of the ongoing FSLIC investigation, "this office is unable at this time to proceed with the application [seeking approval of Pelletier as president]." Further, Behrens advised, "we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Saving is complete." The letter was on Board stationery and signed by Behrens as "Supervisory Agent" of Pioneer.

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by Pioneer.

B. The Present Lawsuit

This lawsuit was brought by Pelletier in response to his dismissal. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Mr. Behrens. The lawsuit sought damages from Behrens under a *Bivens* theory, the claim being that Behrens, action declining to approve Pelletier as president of Pioneer until the FSLIC investigation was completed violated plaintiff's Fifth Amendment property rights. The complaint also asserted various common law torts allegedly committed by Behrens, and sought equitable and monetary relief from the federal agencies.

Beherns moved to dismiss, or in the alternative for summary judgment. He argued, *inter alia*, that the sole remedy for common law tort claims based upon actions

of an employee of the government is the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679. Under this statute the United States must be substituted for the federal employee, and the case must then proceed under the FTCA.

Beherns additionally asserted that the California one year statute of limitations, Cal. Civ. Proc. Code, Section 340(3), barred the *Bivens* claim and the common law tort claims; that "special factors counselling hesitation" barred a *Bivens* remedy, under the authority of *Bush v. Lucas*, 462 U.S. 367 (1983); and that he was entitled to qualified immunity from suit, as a federal officer who violated no clearly established law.

C. The District Court Orders

The district court, on September 11, 1989, dissolved a previously entered protective order barring discovery. Thereafter, on October 5, 1989, the lower court issued an order disposing of defendants, motion to dismiss, and denying the motion for summary judgment.

The court concluded that the primary actions upon which plaintiff's complaint was based – the letter from Beherns, declining to approve the appointment of Pelletier as Pioneer's president, and Pioneer's subsequent independent action terminating Pelletier's employment, were time-barred under California's one year statute of limitations. Accordingly, the court granted the motion to dismiss the *Bivens* count, but only "to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and

Loan * * * ." (Order of October 5, 1989, Slip op. 2). Even though no other *specific* acts commited by Behrens were alleged in the complaint, but only the general charge that defendants engaged in a continuing conspiracy to keep plaintiff from finding suitable employment in the financial industry, the district court refused to dismiss the *Bivens* count "to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment." (*Id.* at 3).

Applying the same logic, the district court ruled that several of the common law tort counts against Beherns would be dismissed, as barred by the California one year statute of limitations, but only insofar as the claims were "based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer" (Slip op. 4). Further, the court denied the motion seeking substitution of the United States on the common law counts – even though this is required by statute.

Since the district court had earlier dissolved a protective order barring discovery, and since the district court, on November 8, 1989, denied Beherns, motion to stay discovery and trial pending appeal, Beherns now faces the twin burdens of discovery and trial – even though an appeal of the denial of qualified immunity is pending before this Court.

Moreover, since the district court has also denied the motion of the Bank Board for a stay pending appeal of the substitution issue, Beherns also now faces a trial on the common law tort counts.

ARGUMENT

This case meets the requirements for a stay pending appeal. In *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the Supreme Court reaffirmed the traditional four-factor test for evaluating the necessity of issuing stays: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

A. Irreparable Harm

1. This Court, the Supreme Court, and most other federal courts, have recognized that the immunity defense is intended to spare the federal official the burdens of discovery and trial. Permitting discovery and trial to proceed while a good faith appeal of the immunity issue is pending in the court of appeals inevitably causes irreparable harm by requiring the defendant to forfeit the very protections which the defense of qualified immunity is intended to provide. See, *e.g. Harlow v. Fitzgerald, supra*, 457 U.S. 17 (a principal purpose of the official immunity defense is to protect public officials from "broad-ranging discovery" that can be "peculiarly disruptive of effective government"); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (the essence of official immunity is "its possessor's entitlement not to have to * * * stand trial *or face the other burdens of litigation*) (emphasis added). This Court has itself recently observed that denials of qualified immunity are

immediately appealable under the collateral order doctrine because "[d]enying the official interlocutory review denies him or her the right to avoid trial * * * ." *Di Martini v. Ferrin*, 889 F.2d at 925. Thus, "until the threshold issue of immunity is resolved, discovery should not proceed." (*Id.* at 926).[5] It follows that if a trial court permits discovery and trial to go forward while an appeal of the denial of qualified immunity is pending, the defendant is irreparably harmed. Even if he prevails on appeal, the right not to be subject to discovery and trial will have already been lost. For this reason, the United States Court of Appeals for the Seventh Circuit recently held that whenever the denial of official immunity is appealed, the proceedings before the trial court are *automatically stayed*. See *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989). The Seventh Circuit reasoned as follows:

> The justification for the interlocutory appeal is that the trial destroys rights created by immunity * * * . It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one * * * . [A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial. *Cf. Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738 ("Until this threshold immunity question is resolved, discovery should not be allowed."). [870 F.2d at 1338]

In this case, the district court has refused to stay discovery and trial on the immunity issue. The court has

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[5] See also, *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989).

not even seen fit to issue a narrow discovery order, although the Supreme Court's decision in *Anderson* makes it clear that if discovery is permitted, the discovery orders must be narrowly drawn.[6] Thus, only a stay pending appeal will prevent irreparable harm to the defendant.

2. The irreparable harm Beherns will suffer will be compounded by the refusal of the district court to substitute the United States as defendant on the common law tort counts.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-64, 102 Stat. 4563 (1988) absolutely and unequivocally requires substitution of the United States in the circumstances presented here. See, *Sowell v. American Cyanamid Company*, 888 F.2d 802 (11th Cir. 1989); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989). The act was an express congressional response to *Westfall v. Erwin*, 484 U.S. 292 (1988), and was intended to restore the general rule of absolute immunity for torts committed by federal employees within the scope of their duties, a rule which had been eroded by the *Westfall* case. *See* H.R. Rep. 100-700, 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S. Code Cong. & Ad. News 5945, 5946. Congress recognized that such immunity is "essential if Federal employees [a]re to be willing to carry out the duties of their office." *Id.* To guard against the debilitating effects of personal liability, Congress amended the

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[6] Although there may be instances where discovery is necessary to resolve factual disputes, "any such discovery should be tailored specifically to the question of * * * immunity." *Anderson v. Creighton*, 483 U.S. at 646 n.6.

Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, by (1) providing that the FTCA's remedy against the United States for negligent or wrongful acts by government employees acting within the scope of their employment "is exclusive of any other civil action or proceeding for money damages * * * against the employee * * * "; and (2) authorizing the Attorney General or his designate to issue a "certification" that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose * * * ." Reform Act, secs. 5, 6, amending 28 U.S.C. 2679(b), 2679(d)(1)(2). Once a scope certification is made, the suit "shall be deemed an action against the United States" under the FTCA and that "the United States shall be substituted as the party defendant." *Id.*

In this case, there was a proper certification by the Attorney General stating that Behrens was acting within the scope of his employment. However, the district court declined to substitute – giving no reason except that substitution was "premature." Since the district court also refused to stay its order pending appeal to this Court,[7] Mr. Behrens will have to stand trial on the common law tort counts himself, contrary to the specific provisions of the Westfall statute. This is clearly irreparable harm, and for this reason too a stay pending appeal is respectfully requested.

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[7] Like the appeal of the denial of qualified immunity, the appeal of the refusal to substitute the United States is reviewable as a final collateral order under 28 U.S.C. 1291. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The order denying substitution is separable from the remainder of the case, involves an important and unsettled question of law, and has final consequences.

B. Likelihood of Success on the Merits

1. The defendants have every likelihood of success on the merits of their appeal. The act upon which the legal theories of plaintiff's complaint principally rest – Behrens, letter declining to approve Pelletier as President until the FSLIC investigation was concluded – was correctly found by the district court to be time-barred.[8] This leaves only generalized complaints that Behrens and the other defendants somehow "conspired" to deny Pelletier employment in the financial industry. However, as this Court has repeatedly held, most recently in *Di Martini v. Ferrin*, where similar allegations were made, "a plaintiff is not entitled to survive on vague assumptions [about the loss of employment opportunities]" not supported by specific allegations in his complaint. 889 F.2d at 927. Clearly, plaintiff should not be able to preclude a ruling on immunity, or on the common law tort issues, by relying on liberal notions of pleading; the defendant has given a detailed explanation of his actions and plaintiff cannot simply rest upon the bare allegations of his complaint. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

2. Moreover, even if the specific allegations of the complaint were not time-barred, the district court should have granted Behrens immunity on the *Bivens* count, and should have substituted the United States on the common law tort counts.

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[8] See Cal. Civ. Proc. Code, Section 340(3); *Keller v. United States*, 667 F.Supp. 1351, 1360 (S.D. Cal. 1987).

(a). Qualified Immunity

The plaintiff's principal complaint is that because he was being investigated by the FSLIC for wrongdoing during his tenure at another bank, Behrens refused to approve his appointment as president of Pioneer. He attempts to make out of this action by Behrens a constitutional violation. However, there was nothing remotely illegal about Behrens, refusal to approve Pelletier. Pelletier was the subject of an FSLIC investigation which found wrongdoing at the Beverly Hills Savings & Loan Association, where Pelletier had been a senior loan officer. Had Beherns approved Pelletier, he might later have been charged with not carrying out the mandates of his office.[9] All Behrens did was to decline approval of Pelletier "at this time," and until "the investigation into the failure of Beverly Hills Saving is complete." It was, after all, Pelletier's employer, Pioneer, that made the decision to terminate him; this was not a decision made by Behrens.

To deny immunity, the district court would have had to find that Behrens, in declining to approve Pelletier as president, reasonably should have known he was violating a clearly established right. As we have just observed, Behrens was only being true to the requirements of his

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[9] Indeed, the FSLIC subsequently sued Pelletier and other former officers and directors of Beverly Hills for alleged breach of fiduciary duty, negligence, waste and diversion of corporate assets. The defendants in that case, Pelletier included, have finalized a settlement agreement expected to result in the payment to FSLIC of more than $8 million.

job. He could not have reasonably believed he was violating clearly established law.

The Fifth Circuit's recent holding in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989) supports this conclusion. In a factual situation remarkably similar to the one here, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established right to property or liberty interest in being a president designate, for the position was contingent upon regulatory approval. 876 F.2d at 1213, 1214.[10]

It appears that the district court denied Behrens immunity, because of doubts over Behrens, employment status. Behrens was appointed by the Federal Home Loan Bank Board and the FSLIC, but he was paid by the

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[10] See also, *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 107 S. Ct. 276 (1986) (unsuccessful applicant for ALJ position had no property interest in the job).

While this Court, in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987) (now once again on appeal on the qualified immunity issue, No. 89-35270), held that the plaintiff had a property right in private employment which required a hearing prior to termination, that decision was not handed down until 1987. The acts complained of here occurred in 1986. In any event, the panel in *Mackey* was faced with a situation where an employee of the government told a private corporation to fire an individual; in this case, Beherns simply declined to approve the appointment of Pelletier pending the outcome of the FSLIC investigation.

Federal Home Loan Bank Board of San Francisco, a private institution. This fact, however, should not change the immunity analysis. Official immunity questions. are to be decided on the basis of the nature of the functions performed by the defendant, not on the defendant's position in the government. *Harlow v. Fitzgerald*, 457 U.S. at 807, 811-12; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n. 30; *Butz v. Economou*, 438 U.S. 478, 511 (1978). Here, in any case, defendant Behrens was actually an appointee of the Board and the FSLIC, and performing federal functions entrusted to him by statute and regulations. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He is thus in a position to claim qualified immunity from suit.

(b). Substitution of the United States

(1). Clearly, the United States should have been substituted for Behrens under the Federal Employees Liability Reform and Tort Compensation Act of 1988, and the suit permitted to proceed to judgment under the FTCA.

The Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation are federal agencies under the FTCA. See, 28 U.S.C. 2671 (federal agency includes independent establishments of the United States).[11]

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[11] See also, *Colony First Fed. Sav. v. Federal Sav. & Loan*, 643 F.Supp. 410, 416 (C.D. Cal. 1986) (both Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation federal agencies for FTCA purposes); *Kohlbeck v. Kis*, 651 F.Supp.

It is equally clear that Behrens is a federal employee under the FTCA, even though his salary was paid by the FHLB-SF, a privately owned institution. The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965). Under the FTCA, the term "employee of the government" includes "officers or employees of any federal agency," members of the military or naval forces of the United States, and most importantly for our purposes, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. This definition was intended to be read liberally. See *Witt v. United States*, 462 F.2d 1261, 1263 (2d Cir. 1972); *Ferguson v. United States*, 712 F.Supp. 775, 781 (N.D. Cal. 1989). The definition clearly covers Behrens, who was a properly appointed Supervisory Agent. Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent, *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added).

(2). The remaining question is whether Behrens was acting within the scope of his employment when he

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1233, 1236 (D. Mont. 1987) (FSLIC federal agency for FTCA); *Federal Savings and Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969); *Safeway Portland E.F.C.U. v. Federal Deposit Ins. Corp.*, 506 F.2d 1213, 1215 (9th Cir. 1974).

advised against employing Pelletier until the BHSL investigation had been completed. The district court determined, in dissolving an earlier entered protective order, that "whether [Behrens] acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." This conclusion is wrong, for the following reasons.

First, the Attorney General certified that Behrens was acting within the scope of his employment in this case. The burden of proof has thus become the plaintiff's burden; he must establish that the Attorney General's decision is erroneous.

Second, the judgment of the Attorney General regarding scope deserves substantial deference from the courts. While the issue of scope is ultimately a matter of state tort law, underlying that ultimate issue are determinations on matters that are uniquely within the purview of the Executive Branch – *i.e.*, defining the activities that are within the employer's "business," and ascertaining the range of responsibilities entrusted to the individual employee. These are matters that are governed by the agency's statutory responsibilities, as well as the regulations and internal directives of the agency itself, often including written descriptions of the scope of individual duties. Executive agencies are entitled to great deference in construing and applying such materials. *See generally, Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965). When the Attorney General, in consultation with the agency in question, determines that an individual was in fact acting within the scope of his duties as defined by his employing agency, that is a determination

to which the courts should give great weight. An affirmative scope determination is, moreover, a step that the Attorney General is not apt to take lightly, since it unilaterally opens up the federal treasury to the possibility of liability that it would not otherwise face.

Third, it is clear that Behrens *was* acting within scope of his authority when he recommended that the decision on plaintiff's appointment as president of Pioneer be deferred. An employee is acting within the scope of his employment under the law of California "when he is engaged in work he was employed to perform, or when the act is incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience." See 29 Cal. Jur. 3d, Section 107, page 743 (1986 ed.).[12] Under the California standard, there is no doubt that Behrens was simply performing his job, and thus was within the scope of his employment. As a duly appointed Supervisory Agent, Behrens was authorized by statute to act broadly in the agency's interests. See 12 C.F.R. 501.11(e). tions such as Pioneer, (*i.e.* "*de novo* applicants for insurance"), Behrens was empowered to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Since under the regulations the agency "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of

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[12] To exonerate an employer from liability for his employee's action, "the employee's deviation from his duty must be for entirely personal purposes." See *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal. Rptr. 106 (1986).

the management is questionable," *id.*, Behrens was acting within the scope of his authority in refusing to approve the plaintiff as Pioneer's president; for there was ample evidence that the plaintiff had mismanaged the Beverly Hills Savings & Loan Association, prior to his association with Pioneer. Moreover, Behrens took his action pursuant to Bank Board Resolution No. 84-164 (March 29, 1984), which conditioned Pioneer's insurance on its agreement to employ "a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent."

In sum, the United States should have been substituted for the defendant under the Westfall statute.[13]

C. The Public Interest And Lack Of Harm To Pelletier

These final factors are self-evident, and need little discussion. They favor granting the stay.

1. The public interest clearly lies in staying the district court actions pending appeal. Laws such as the

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[13] We recognize that in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), this Court held that the Westfall Act's substitution provision applies only where the FTCA provides an effective alternative remedy for the plaintiff. Here, unlike the situation in *Smith*, the FTCA does provide an effective alternative remedy. The plaintiff in our case would only be barred by 28 U.S.C. 2680(h) from continuing with his claim based on interference with contractual relations; he would have a viable FTCA action against the United States on his other allegations, which assert the commission of the common law torts of negligence, and negligent and intentional infliction of emotional distress.

Federal Employees Liability Reform and Tort Compensation Act of 1988 cannot be given short shrift by the courts. That law plainly requires substitution of the United States. By its action denying substitution, the court has undermined the public interest in having the laws of Congress enforced.

Similarly, it is in the public interest to have the qualified immunity defense preserved pending appeal. The very purpose of the immunity defense, which is to spare government officals the burdens of discovery and trial, would be irrevocably done away with by permitting a trial prior to this Court's ruling on the immunity issue. Particularly in a case like this, where the district court has given little justification for its actions, and the moving parties have demonstrated a likelihood of success on appeal, the public interest can only be served by staying the discovery and trial.

2. No irreparable harm will be caused the plaintiff by such actions. Indeed, once the United States is substituted under the Westfall statute, the plaintiff will be able to litigate his case against the government, knowing that any ultimate judgment will in fact be paid out of the federal treasury.

CONCLUSION

For the foregoing reasons, a stay of discovery and trial in the district court, pending appeal, is respectfully requested.

Respectfully Submitted,

/s/ Barbara L. Herwig
BARBARA L. HERWIG
(202)/FTS 633-5425

/s/ Richard A. Olderman
RICHARD A. OLDERMAN
(202)/FTS 633-3542
Attorneys, Appellate Staff
Civil Division, Room 3616
Department of Justice
Washington. D.C. 20530-0001

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DEFENDANT/APPELLANT'S BRIEF, EOD MARCH 6, 1990

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR FEDERAL DEFENDANT BEHRENS

STUART M. GERSON
Assistant Attorney General

ROBERT L. BROSIO
United States Attorney

BARBARA L. HERWIG
(202)/FTS 633-5425

RICHARD A. OLDERMAN
(202)/FTS 633-3542
Attorneys, Appellate Staff
Civil Division, Room 3631
Department of Justice
Washington, D.C. 20530-0001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER Plaintiff-Appellee v. FEDERAL HOME LOAN BANK BOARD Defendants, and JOHN W. BEHRENS Defendant-Appellant.	)	No. 89-56265

CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

The undersigned, counsel of record for the appellant John W. Behrens, certifies that the following have an interest in the outcome of this case:

John W. Behrens, defendant

Robert J. Pelletier, plaintiff

United States of America, as potential substituted defendant

/s/ Richard A. Olderman
RICHARD A. OLDERMAN

Attorney, Appellate Staff
Civil Division, Room 3616
Department of Justice
Washington, D.C. 20530-0001

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-56265

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR FEDERAL DEFENDANT BEHRENS

QUESTIONS PRESENTED

1. Whether, to the extent the complaint alleges the commission of common law torts, the district court erred by failing to substitute the United States for the individual defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988.

2. Whether, under the authority of *Bush v. Lucas*, 462 U.S. 367 (1983), *Schweiker v. Chilicky*, 108 S. Ct. 2460

(1988), *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), and *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990), the special factor of Congress' comprehensive regulation of the thrift industry bars plaintiff's *Bivens* action.

3. In any event, whether the federal defendant's motion for qualified immunity should have been granted by the district court, under the standards set by the Supreme Court in *Anderson v. Creighton*, 483 U.S. 635 (1987).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides a cause of action for damage actions against federal officials sued in their personal capacities for asserted violations of constitutional rights.

This Court has jurisdiction to review the denial of qualified immunity under 28 U.S.C. 1291. See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989). In addition, as explained *infra* at 17-19, this Court has jurisdiction over the Westfall Act substitution issue, by virtue of the *Cohen* collateral order doctrine.

Additionally, this Court has pendent jurisdiction to review the question whether a *Bivens* remedy is barred by the special factor of Congress' comprehensive regulation

of the thrift industry. See, *Le Bid v. Hanson*, 894 F.2d 1124 (9th Cir. 1990).[1]

STATEMENT OF THE CASE

1. Nature of the Case.

The defendant, a Supervisory Agent of the Federal Home Loan Bank Board ("Bank Board"), declined to approve the plaintiff as president of a California bank because the plaintiff was under investigation by the FSLIC for wrongdoing. Plaintiff sued, asserting a *Bivens* cause of action for the alleged commission of constitutional torts, and claiming the commission of common law torts as well.

The district court declined to dismiss the *Bivens* count and the common law tort counts in their entirety, although it found that the state statute of limitations barred the lawsuit to the extent it rested on the failure to approve plaintiff as president. The court also declined to grant defendant's motion for qualified immunity, and his motion seeking substitution of the United States on the common law counts, as required by the Federal Employees Liability Reform and Tort Compensation Act of 1988. The defendant now appeals the lower court's immunity rulings.

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[1] The district court entered its order denying summary judgment on October 5, 1989. The federal defendant's notice of appeal was filed on December 2, 1989.

2. Statutory Background: Home Loan Bank System[2]

a. Congress created the Federal Home Loan Bank System in the 1930s to restore confidence in American thrift institutions. The system is controlled by the Bank Board, an independent agency of the Executive Branch. The Bank Board is charged with oversight of the nation's federal savings and loan associations, and other federally insured savings institutions. The Bank Board may charter, organize, supervise and regulate savings and loans. See, Home Owners Loan Act, 12 U.S.C. § 1464 *et seq.* In addition, the Board is charged with maintaining the fiscal stability of the savings and loan industry, and must protect depositors in member institutions, through the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FSLIC is a separate agency, which operates under the direction of the Bank Board. 12 U.S.C. §§ 1725(a), 1725(c); 1730(k)(1).

The Federal Home Loan Bank System is composed of twelve regional banks, including the Federal Home Loan Bank of San Francisco ("FHLB-SF"). These banks primarily serve as central reserve credit sources for thrift institutions in their regions. 12 U.S.C. 1427(j). Each regional Federal Home Loan Bank operates as a federally chartered corporate entity whose stock is subscribed to by its

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[2] Most of the banking statutes and regulations discussed in this brief have changed, in light of the enactment by Congress of the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (FIRREA), Pub. L. No. 101-73, 101 Stat. 183. Since all the actions in question took place prior to the enactment of FIRREA, this brief discusses only pre-FIRREA law.

"members," *i.e.* the eligible savings institutions within that Bank's district. See 12 U.S.C. §§ 1424, 1426, 1432(a). The banks, although privately owned, carry out governmental functions and are subject to plenary control by the Bank Board.

Under Section 17(a) of the Federal Home Loan Bank Act, 12 U.S.C. 1437(a), the Bank Board has authority to delegate certain of its supervisory and examination functions to persons who are officers and employees of the regional banks (not to the regional banks themselves). The delegation of authority was formally carried out in this case by Resolution of the Bank Board. However, a delegation of authority may also be made by the "Principal Supervisory Agent." Those individuals who are delegated supervisory functions are denominated "Supervisory Agents." 12 C.F.R. 501.10. See generally, *Saratoga Savings & Loan v. Federal Home Loan Bank*, 724 F. Supp. 683, 684-5 (N.D. Cal. 1989). Bank Board regulations expressly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." *Id.*

b. A duly appointed Supervisory Agent is authorized to act broadly in the agency's interests:

> After issuance by the Board of a charter for a Federal savings and loan association, said agent shall follow up the corporate actions taken by the association in the completion of its organization, and require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. [12 C.F.R. 501.11(e).]

Moreover, when new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Acting on behalf of the FSLIC, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.*

c. Once an approved director or officer has assumed a position with and insured institution, the FSLIC has a continuing obligation and authority to monitor the quality of management. When the FSLIC believes that an officer or director of an insured institution has evidenced personal dishonesty, violated any law, rule, regulation, or final cease-and desist order, participated in any unsafe or unsound banking practice, or breached his fiduciary duty to the institution, the FSLIC may order an immediate suspension of that person from office and institute proceedings to remove him permanently from the thrift industry. 12 U.S.C. § 1730(g)(1) and (2). The agency has the same duty when a thrift officer or director has been indicted or otherwise charged with a crime involving dishonesty or breach of trust. *Id.* § 1730(h).

Although Congress has laid out a careful and comprehensive statutory scheme prescribing varying levels of review for each of the FSLIC actions just described which pertain to approved bank officers (see 12 U.S.C. § 1730(g)(5)), it has not provided for administrative or judicial review of the FSLIC's decisions under 12 U.S.C.

§ 1726(c), the statutory provision which governs applications for FSLIC insurance, and under which defendant Behrens took the action challenged here.

3. Statutory Background: The Westfall Act.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, hereafter referred to as the Westfall Act, has its provenance in the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Prior to the *Westfall* decision, it was widely understood that federal employees enjoyed absolute immunity from common law tort claims as long as they were acting within the scope of their employment. See, *e.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion). In *Westfall*, however, the Supreme Court held for the first time that absolute immunity was not available "unless the challenged conduct is within the outer perimeter of an official's duties *and* is discretionary in nature." 484 U.S. at 297-98 (emphasis in original).

By adding the requirement that a federal employee's actions be "discretionary in nature," the Court significantly restricted the previously recognized scope of absolute immunity for common law torts. At the same time, however, the Supreme Court invited Congress to review by legislation the standard it had adopted, remarking that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. The Court added that "[l]egislated standards governing the immunity of federal

employees involved in state-law tort actions would be useful." *Ibid.*

Within 10 months, Congress responded to the Court's invitation by enacting legislation to overturn the *Westfall* decision. The Westfall Act restores the absolute immunity of government employees for acts within the scope of their employment by requiring plaintiffs in such cases to proceed exclusively against the United States under the Federal Tort Claims Act ("FTCA").[3]

The heart of the Westfall Act lies in Sections 5 and 6, which amend the FTCA. Section 5 amends 28 U.S.C. 2679(b) to provide that the FTCA's remedy against the United States for negligent or wrongful acts by government employees acting within the scope of their employment "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim * * * ." As a result, in the words of the House report on the Westfall Act, "the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual Federal employee or his estate if such action or proceeding would sound in common law tort." H.R. Rep. No. 100-700, 100th Cong., 2d Sess. 5 ("House Report"), *reprinted in* 1988 U.S. Code Cong. & Admin. News ("USCCAN") 5949. Congress's purpose in enacting this exclusive-remedy scheme was to render federal employees "immune from personal liability" for actions within the scope of their employment, thereby

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[3] The text of the Westfall Act is reproduced in the statutory addendum to this brief.

"return[ing] [them] to the status they held prior to the *Westfall* decision." *Id.* at 4, 1988 USCCAN at 5947.

Section 6 implements Section 5's exclusive-remedy provision by authorizing the Attorney General or his designate to issue a "scope certification" – a certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose * * * ." 28 U.S.C. 2679(d)(1)-(2).[4] Once a scope certification is made, Section 6 provides that the suit "shall be deemed an action against the United States" under the FTCA and that "the United States shall be substituted as the party defendant." *Ibid.* Any such action "shall proceed in the same manner as any action against the United States [under the FTCA] * * * and shall be subject to the limitations and exceptions applicable to those actions." *Id.* Section 2679(d)(4).

4. Statement of Facts.

A.1. The defendant, John W. Behrens, is an employee of the FHLB-SF. On March 17, 1984, the Federal Home Loan Bank Board adopted Formal Resolution 84-126, designating Behrens a Supervisory Agent, hence

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[4] The Attorney General has delegated this authority by regulation to United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See, 28 C.F.R. 15.3 (1988). The Attorney General's delegation authority is set forth in 28 U.S.C. 510. See, *e.g.*, *United States v. Cuomo*, 525 F.2d 1285, 1287-88 (5th Cir. 1976). The Director of the Justice Department's Torts Branch also has authority to make scope certifications. See, 28 C.F.R. 15.3 (Appendix).

an agent of both the Bank Board and of the FSLIC. (R.E. 20).[5] Behrens continued to be paid by the FHLB-SF, but as an employee of the Bank Board and the FSLIC became responsible for supervising federally insured savings and loan institutions in the San Francisco district to insure compliance with law.

2. The plaintiff, Robert. J. Pelletier, was the president-designate of Pioneer Savings & Loan Association. Pioneer's predecessor in interest, South Coast Savings & Loan Association, had received Board approval for insurance of its accounts. However, one of the conditions of this approval, as specified by Bank Board Resolution 84-164, was that the institution –

> shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent * * * . In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following, * * * the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval. [R.E.27]

In sum, Pioneer was required to obtain approval of its new president-designate from Supervisory Agent Behrens.

This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan

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[5] "R.E." refers to the excerpts of record filed with this brief.

officer and head of the bank's Major Loan Division, disclosed wrongdoing at that bank, problems so serious that on April 23, 1985 the Bank Board declared the Beverly Hills bank insolvent and appointed the FSLIC as its receiver.

The FSLIC's continuing investigation into the problems at the Beverly Hills bank raised questions about Pelletier, who had been a member of the bank's Senior Loan Committee and the head of the Major Loan Division. Indeed, Pelletier was eventually named as a defendant in a lawsuit brought by the FSLIC against the former officers and directors of the Beverly Hills Savings & Loan, seeking to recover damages for alleged breach of fiduciary duty, negligence, waste, divergent of corporate assets and negligent misrepresentation. [R.E. 28].

As a result of the FSLIC's investigation, which raised doubts about Pelletier's management, and pursuant to his mandate as Supervisory Agent, which required him to "reject an applicant if [he] finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and empowered him to "reject an applicant if the character of the management is questionable," *Id.*, Behrens sent a letter to Pioneer's board of directors. The letter, dated May 8, 1986, and written on the official letterhead of the "Federal Home Loan Bank Board, Eleventh District, Office of Supervisory Agent," was signed "John W. Behrens, Supervisory Agent." Marked "Confidential," the letter stated as follows:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in this regard. [R.E. 28]

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by pioneer.

5. The Present Litigation.

This lawsuit was brought by Pelletier after his dismissal by Pioneer. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Behrens. Counts one and two of the complaint sought damages and equitable relief based upon an alleged deprivation of Pelletier's procedural and

substantive due process rights under the Fifth Amendment. Counts three and four sought damages and equitable relief for asserted violations of the Administrative Procedure Act and the Privacy Act. Counts five through eight sought damages for the alleged commission of the following common law torts: interference with contract rights and inducement to breach contract; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence. [R.E. 1-17].

The defendant moved to dismiss, or in the alternative for summary judgment, urging *inter alia* that he was entitled to qualified immunity from suit on the *Bivens* count, and that pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 the United States must be substituted as defendant, and the case then allowed to proceed against the sovereign under the Federal Tort Claims Act.

6. The District Court Orders.

The district court acted without holding a hearing. In an order dated September 11, 1989, the court dissolved a protective order which had earlier been granted by a magistrate. The district court stated that "although Behrens may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." [R.E. 29].

Subsequently, on October 6, 1989, the court entered a four page ruling on all pending motions to dismiss, or in the alternative for summary judgment. The court held

that the California one year statute of limitations barred any *Bivens* suit based on the letter that Supervisory Agent Beherns sent to Pioneer, or based upon plaintiff's loss of employment. Nonetheless, because plaintiff had made unsupported allegations of a conspiracy to keep him from finding employment in the financial institutions industry, the court denied defendant's motion for qualified immunity "to the extent said [constitutional] claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment." [R.E. 33].

The court also denied, without explanation, the motion seeking substitution of the United States as defendant, even though substitution is required by the Westfall statute. *Id.*

Further, the court denied Behrens' motion to dismiss counts five and eight of the complaint, which were based on the torts of interference with contract and negligence; and granted the motion to dismiss counts six and seven, which alleged intentional and negligent infliction of emotional distress, only to the extent such claims were barred by the California one year statute of limitations.[6]

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[6] The court also refused to dismiss the APA claim for injunctive relief, which was addressed to Behrens in his official capacity; and granted the motion to dismiss APA and Privacy Act claims addressed to Behrens in his individual capacity. The October 6th ruling also kept all the other defendants in the case on various counts. The court also granted the motion of the United States to dismiss Count 5 of the complaint as barred by 28 U.S.C. 2680(h), but denied the United States' motion to dismiss the remaining common law tort counts. (R.E. 33-34).

Since the district court had earlier vacated a magistrate's protective order, thereby subjecting the defendant to both discovery and trial, defendant moved for a stay pending appeal to this Court.

The stay was denied. A similar motion for a stay was filed with this Court on February 2, 1990 and is presently pending.

REVIEWABILITY AND STANDARD OF REVIEW

This Court "reviews *de novo* the denial of a qualified immunity defense." *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir.1989). Since it involves a pure question of law, this Court also reviews *de novo* the question whether the United States should have been substituted for the defendant Behrens under the authority of the Westfall statute, and the question whether a *Bivens* remedy is barred by the special factor of Congress' comprehensive regulation of the thrift industry. See, *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990).

SUMMARY OF ARGUMENT

This case presents three principal questions in clear form: whether the district court erred when it declined to substitute the United States as defendant on the common law tort counts; whether the court erred when it failed to dismiss the Bivens claim; and whether the court erred by refusing to grant the defendant qualified immunity. The lower court's rulings on all three issues were wrong and should be reversed.

A. The district court erroneously declined to substitute the United States for defendant Behrens on common law tort counts, for substitution was affirmatively required by the Westfall Act. Since the plaintiff was a federal employee who at all times was acting within the scope of his authority, substitution was mandatory under the statute. See, *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Sowell v. American Cyanamid Co.*, 888 F.2d 802 (11th Cir. 1989); *Saratoga Savings & Loan v. Federal Home Loan Bank, supra*, 724 F. Supp. at 684-5.

B. The district court also erred in its resolution of the *Bivens* issue. The precedents of this Court, including *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), and *Le Bid v. Hanson*, 894 F.2d 1124 (9th Cir. 1990), indicate that the special factor of Congress' comprehensive regulation of the thrift industry bars plaintiff's *Bivens* action. Congress has heavily regulated the thrift industry, and provided administrative and judicial remedies for removal of bank officers. However, Congress has not inadvertently declined to create such remedies for proposed officers such as the plaintiff. It would be improper, given the special factor of Congress' comprehensive thrift industry regulation, for a court to imply a *Bivens* remedy in these circumstances.

C. In any event, Behrens is entitled to qualified immunity on the *Bivens* count. To deny him this immunity, the plaintiff must not only show that Behrens violated clearly established law, but that on the basis of the information he reasonably believed to be true, Behrens

should have known he was violating such clearly established law. Plaintiff has failed to make this showing. Behrens not fire Pelletier, or even direct that he be fired; Behrens only stated in his letter to the Pioneer bank that the Board was "unable at this time to proceed with the application" seeking approval of Pelletier as president, because of the ongoing FSLIC investigation of the Beverly Hills bank where Pelletier had previously been employed. It was Pioneer which decided not to await the outcome of the FSLIC investigation, but to fire Pelletier and seek another president. This factual scenario indicates that Behrens acted properly; given what eventually occurred – Pelletier was sued by the FSLIC for alleged breach of fiduciary duty, waste and diversion of corporate assets – had Behrens acceded to Pioneer's request and approved Pelletier, with full knowledge of the ongoing FSLIC investigation, Behrens could have been charged with not carrying out the responsibilities of his office.

Furthermore, there was no clearly established due process law, about which Behrens should reasonably have known. The Fifth Circuit, in a situation similar to the one here, recently held that an applicant for the presidency of a proposed national bank who claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law, actually had no clearly established property right in employment where the employment was "contingent upon regulatory approval." *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1213 (5th Cir. 1989).

ARGUMENT

I.

THE DISTRICT COURT ERRED BY NOT SUBSTITUTING THE UNITED STATES FOR DEFENDANT BEHERNS ON THE COMMON LAW TORTS COUNTS

A. This Court Has Jurisdiction To Hear This Issue Under The Cohen Collateral Order Doctrine.

This Court has jurisdiction to hear the argument which we make on the following pages, pursuant to the *Cohen* collateral order doctrine. The argument is in essence an absolute immunity claim, immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

1. It is well-established that denials of immunity are final decisions within the meaning of 28 U.S.C. 1291, notwithstanding the absence of a final judgment. See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989). A federal official's immunity is not a mere immunity from liability, but an "*immunity from suit.*" *Mitchell v. Forsyth*, 472 U.S. at 526 (emphasis in original). This right is lost if the case is permitted to go to trial. *Di Martini v. Ferrin*, 889 F.2d at 925.

When a federal employee takes actions within the scope of his employment, the Westfall Act vests him with absolute immunity from liability for common law tort claims based on those actions.[7] The mechanism for

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[7] The Westfall Act was an express congressional response to *Westfall v. Erwin*, 484 U.S. 292 (1988), and was intended to restore the general rule of absolute immunity for torts

granting absolute immunity is the substitution of the United States. The district court in this case, having failed to substitute the United States for Behrens, has effectively denied the federal employee absolute immunity from suit. This ruling is immediately appealable, under *Forsyth*.

2. To fall within the scope of the *Cohen* collateral order doctrine, the order sought to be appealed must (1) conclusively determine the dispute in question; (2) resolve an important issue completely separate from the merits of then action; and (3) be effectively unreviewable on appeal from a final judgment. See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Riverhead Savings v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990). These three conditions are satisfied here. The lower court's ruling determined that Behrens must stand trial as defendant, and rejected his claim under the Westfall statute to absolute immunity; in so ruling the court conclusively resolved an important issue, one separate from the merits of the common law tort claim. Moreover, any proceeding against Behrens on the common law tort counts will make the issue we wish to raise before this Court – whether substitution of the United States was mandatory – unreviewable. By the time the case reaches this Court after final judgment Behrens will have already been subject to the burdens of discovery and trial, the

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committed by federal employees within the scope of their duties, a rule which had been eroded by the *Westfall* case. *See* H.R. Rep. 100-700, 100th Cong., 2d Sess. 2 *reprinted in* 1988 USCCAN 5945, 5946.

very burdens that an immediate appeal of immunity decisions under the *Cohen* doctrine was intended to avoid.[8] The three conditions of *Cohen* have thus been met here, and the substitution issue is properly presented to this Court for review.

B. By Statute, The United States Must Be Substituted As Defendant, And Plaintiff's Claim Must Be Dismissed.

Insofar as common law torts are alleged, this case involves a routine application of the provisions of the

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[8] In the alternative, the Westfall substitution issue may be reviewed by the Court as pendent to the appeal of the denial of qualified immunity. Under the doctrine of pendent appellate jurisdiction, the appellate court may review an otherwise non-appealable issue when "there is sufficient overlap in the factors relevant to [the appealable and nonappealable] issues" to warrant the exercise or plenary jurisdiction. See, *Broughton v. Courtney*, 861 F.2d 639 (11th Cir. 1988); *San Filippo v. United States*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). The pendent jurisdiction doctrine effectuates the salutary policies of conserving judicial resources and avoiding piecemeal litigation. See *United States v. Ianniello*, 824 F.2d 203 (2d Cir. 1987). See also *Howard v. Parisian*, 807 F.2d 1560, 1566 (11th Cir. 1987); 16 Wright & Miller, *Federal Practice and Procedure*, § 3937 (1977) (& Supp.).

While we recognize that, at least in some circumstances, this Court frowns upon using pendent jurisdiction to reach nonimmunity issues, see, *e.g. Todd v. United States*, 849 F.2d 365, 368, 371 n.9 (9th Cir. 1988), the substitution issue is, as we explained above, in reality a statutory absolute immunity issue. Moreover, Behrens' employment status with the government is relevant to both the qualified immunity and substitution issues. Such overlap is a traditional ground for invoking a court's pendent jurisdiction. See, *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987); *San Filippo*, 737 F.2d at 255.

Westfall Act and the FTCA. When a federal employee takes actions within the scope of his employment, the Westfall Act vests him with absolute immunity from liability for common law tort claims based on those actions. By virtue of the Westfall Act, a plaintiff's claim against the United States for common law torts by a federal employee within the scope of his employment "is exclusive of *any* other civil action or proceeding for money damages by reason of the same subject matter against the employee * * * ." 28 U.S.C. 2679(b)(1) (emphasis added). When the Attorney General or his designee certifies that the employee's actions were within the scope of employment, the Westfall Act mandates that the suit "shall be deemed an action against the United States" under the FTCA and "the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1)-(2). Here, the Director of the Justice Department's Torts Branch duly certified that the defendant was acting within the scope of his employment in connection with the events underlying plaintiff's suit. The United States, therefore, should have been substituted as defendant, and the suit should have been permitted to "proceed in the same manner as any action against the United States [under the FTCA] * * * and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4).

We now address the points of debate on this issue. They are as follows: whether Behrens was a federal employee for purposes of the Federal Tort Claims Act; and whether he was acting within the scope of his authority at the time the actions alleged took place. If these

questions are answered in the affirmative, then substitution of the United as defendant should have been permitted by the district court.

1. **Behrens is a federal employee for FTCA purposes.**

The Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation are federal agencies under the FTCA. See, 28 U.S.C. 2671 (federal agency includes independent establishments of the United States); *Colony First Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Co.*, 643 F. Supp. 410, 416 (C.D. Cal. 1986) (both Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation federal agencies for FTCA purposes); *Kohlbeck v. Kis*, 651 F. Supp. 1233, 1236 (D. Mont. 1987) (FSLIC federal agency for FTCA). See also, *Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969); *Safeway Portland E.F.C.U. v. Federal Deposit Ins. Corp.*, 506 F.2d 1213, 1215 (9th Cir. 1974).

Just as it is clear that these are federal agencies, so too is it manifest that Behrens is a federal employee under the FTCA, even though his salary was paid by the FHLB-SF, a privately owned institution carrying out governmental functions. The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965). Under the FTCA, an "employee of the government" is defined as "officers or employees of any federal agency, members of the military or naval forces of the United States", and

most importantly for our purposes, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. The definition clearly covers Behrens, who was a properly appointed Supervisory Agent. Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added).

Moreover, in this Circuit, "[t]he word 'employee' [under the FTCA] is to be read as having the same general meaning in the Act as the term 'servant' has in the body of rules relating to the doctrine of respondeat superior," *Bruck v. United States*, 338 F.2d 427, 428 n. 2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965) (citing Restatement (Second) of Agency, Section 220 (1958)). Behrens' appointment fulfills the criteria set forth in the Restatement (Second) of Agency, Section 220(2), which provides that in determining if an individual is acting as the servant of another, a court is to consider, *inter alia*, the extent of control which the master exercises over the work; whether the employee or the employer supplies the tools and the place of work; whether the work is part of the regular business of the employer; whether the work is done under the direction of the employer or without supervision; and whether the parties believed they were entering into a master/servant relationship. Applying these factors here results in a finding that Behrens was a federal employee, for the Bank Board had plenary control over his activities, supervised his work, and understood

he was to be an employee. See, *e.g., United States v. Becker*, 378 F.2d 319 (9th Cir. 1967); *Letnes v. United States*, 820 F.2d 1517 (9th Cir. 1987).[9] Other courts, in precisely the same situation presented here, have found that the Supervisory Agent was an employee of the Bank Board, and have ordered substitution of the United States as defendant, pursuant to the Westfall Act. See, *e.g., Saratoga Savings & Loan v. Federal Home Loan Bank, supra*, 724 F.Supp. at 687.

2. Behrens was Acting Within the Scope of His Employment.

The remaining question is whether Behrens was acting with the scope of his employment when he advised against employing Pelletier until the BHSL investigation had been completed. The district court determined, in dissolving an earlier entered protective order, that "whether [Behrens] acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." This conclusion is wrong, for the following reasons.

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[9] The fulfillment of these conditions also demonstrates that Behrens met the criteria under California law for a borrowed servant. The borrowed servant doctrine has been applied by the Ninth Circuit in cases arising under the FTCA in order to establish the liability of the United States. See, *e.g. United States v. N.A. Degerstrom, Inc.*, 408 F.2d 1130 (9th Cir. 1969) (operator of heavy equipment leased by government complete with operators, was loaned servant and thus a federal employee under FTCA). See also, *Dornan v. United States*, 460 F.2d 425 (9th Cir. 1972).

a. First, the Attorney General's designee certified that Behrens was acting within the scope of his employment in this case. The burden of proof has thus become the plaintiff's burden; he must establish that the scope determination is erroneous.

b. Second, the judgment of the Attorney General's designee regarding scope deserves substantial deference from the courts. While the issue of scope is ultimately a matter of state tort law, underlying that ultimate issue are determinations on matters that are uniquely within the purview of the Executive Branch – *i.e.*, defining the activities that are within the employer's "business," and ascertaining the range of responsibilities entrusted to the individual employee. These are matters that are governed by the agency's statutory responsibilities, as well as the regulations and internal directives of the agency itself, often including written descriptions of the scope of individual duties. Executive agencies are entitled to great deference in construing and applying such materials. *See generally, Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43 (1984); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). When the Justice Departmen, in consultation with the agency in question, determines that an individual was in fact acting within the scope of his duties as defined by his employing agency, that is a determination to which the courts should give great weight. An affirmative scope determination is, moreover, a step that the Attorney General is not apt to take lightly, since it unilaterally opens up the federal treasury to the possibility of liability that it would not otherwise face.

c. Finally, it is clear that Behrens *was* acting within scope of his authority when he recommended that the

decision on plaintiff's appointment as president of Pioneer be deferred. An employee is acting within the scope of his employment under the law of California "when he is engaged in work he was employed to perform, or when the act is incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience." See 29 Cal. Jur. 3d, § 107, at 743 (1986).[10] Under the California standard, there is no doubt that Behrens was simply performing his job, and thus was within the scope of his employment. As a duly appointed Supervisory Agent, Behrens was authorized by statute to act broadly in the agency's interests:

> After issuance by the Board of a charter for a Federal savings and loan association, said agent shall follow up the corporate actions taken by the association in the completion of its organization, and require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. [12 C.F.R. 501.11(e).]

Under Board regulations concerning new banking institutions such as Pioneer, (*i.e.* "*de novo* applicants for insurance"), Behrens was empowered to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Since under the regulations the agency "is required to reject an applicant if it finds that the capital of the

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[10] To exonerate an employer from liability for his employee's action, "the employee's deviation from his duty must be for entirely personal purposes." See *Perez v. Van Groningen & Sons, Inc.* 41 Cal. 3d 962, 719 P.2d 6767, 227 Cal Rptr. 106 (1986).

applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable," *id.*, Behrens was acting within the scope of his authority, in refusing to approve the plaintiff as Pioneer's president; for there was ample evidence that the plaintiff had mismanaged the Beverly Hills Savings & Loan Association, prior to his association with Pioneer.[11] Moreover, Behrens took his action pursuant to Bank Board Resolution No. 84-164 (March 29, 1984), which conditioned Pioneer's insurance on its agreement to employ "a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent." (R.E. 27). In such circumstances, he clearly was acting within the scope of his authority. This Court, in *In Re Complaint of McLinn*, 744 F.2d 677, 683 (9th Cir. 1984), recognized (citing the Restatement) that:

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[11] The Restatement provides that "[t]o be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency, Section 229. Moreover, "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment," *id.* at Section 230. Indeed, *"[a]n act may be within the scope of employment although consciously criminal or tortious." Id.* at Section 231 (emphasis added). These principles, which reflect the common law of *respondeat superior*, fully support our position that the defendant was acting within the scope of his employment when he committed the alleged torts – even the intentional torts of interference with contract rights and intentional infliction of emotional distress. See, *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.) (motive not relevant to scope of employment inquiry).

> An employee's conduct is within the scope of employment if it is of the kind he was employed to perform, it occurs substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to further the master's business.

The Tenth Circuit, in *Nietert v. Overby*, has reached a similar conclusion:

> The "scope" of an official's duty is not narrowly defined. An act will fall within the official's scope of authority if it "bear[s] some reasonable relation to and connection with the duties and responsibilities of the official," and is not manifestly or palpably beyond the official's authority. * * *

816 F.2d at 1466 (citations omitted; quoting *Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967)). Thus, actions are within the scope of a federal employee's duties if they have "more or less connection with the general matters committed by law to his control or supervision." *Cooper v. O'Connor*, 99 F.2d 135, 139 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938)). See, *Cross v. Fiscus*, 830 F.2d 755, 757 (7th Cir. 1987) (an official is acting within the outer perimeter of employment when "the occasion * * * would have justified the act, had [the federal employee] been using his power for any of the purposes on whose account it was vested in him").

There can be no doubt that the actions which plaintiff complains of had more or less connection with the general matters committed by law to the defendant's control or supervision and that, accordingly, the defendant was

acting within the scope of his authority.[12] Since this case involves a federal employee acting within the scope of his employment, substitution under the Westfall statute was *mandatory*. The district court judgment to the contrary should be reversed.

II.

CONGRESS' COMPREHENSIVE REGULATION OF THE THRIFT INDUSTRY IS A SPECIAL FACTOR BARRING A BIVENS REMEDY

The decisions of this Court and the Supreme Court indicate that there is no *Bivens* remedy available to the plaintiff in this case. This is because the government's profound interest in a sound thrift system has resulted in comprehensive legislation regulating that industry. This comprehensive legislation is a "special factor" counselling against judicial creation of a *Bivens* remedy.[13]

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[12] We recognize that in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), this Court held that the Westfall Act's substitution provision applies only where the FTCA provides an effective alternative remedy for the plaintiff. But here, unlike the situation in *Smith*, the FTCA in fact does provide an effective alternative remedy. The plaintiff in our case would, if substitution were allowed, proceed with his case against the United States on the common law tort counts alleged. While certain of his claims, such as the claim of interference with contract rights, might be barred by Section 2680(h), plaintiff would likely have a viable FTCA action against the United States on his allegations of common law negligence.

[13] This Court has pendent appellate jurisdiction to hear the "special factors" issue, which is inextricably bound up with the qualified immunity issue. See, *Le Bid v. Hanson*, 894 F.2d 1124 (9th Cir. 1990).

A. The Supreme Court's 1988 decision in *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988), has made it indisputably clear that Congress' complete regulation of an area is a special factor arguing against court created *Bivens* remedies – whether or not the Congressional scheme affords an "adequate" remedy to the litigant. As this Court most recently stated, in exploring the special factors analysis, courts "should not create *Bivens* remedies when the design of a government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration." *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990) (Slip op.at 973). The reasoning of *Chilicky*, which grew out of the social security benefits statute, and the reasoning of earlier Supreme Court cases such as *Bush v. Lucas*, 462 U.S. 367 (1982), which involved the federal Civil Service Reform Act, are fully applicable here. As this Court observed in *Le Bid*, "*Bush's* reasoning extends beyond the civil service context, and *Chilicky's* reasoning extends beyond the Social Security benefits context." Slip op. at 973. In *Le Bid* the reasoning was extended to the Internal Revenue Code; in this case, it should be extended to the statutory scheme governing savings and loan institutions.

B.1. Banks and thrift institutions in this country are subject to comprehensive regulation and control by federal regulatory agencies, the purpose of which is to ensure the safety of deposits in federally-insured institutions and thus protect and enhance public confidence in the nation's banking system. Recognizing that the character and quality of management is of critical importance to these goals, Congress has given the Bank Board and

FSLIC broad authority to determine who may own and operate federally-insured thrift institutions. The Change in Savings and Loan Control Act, 12 U.S.C. § 1730(q), for example, forbids the acquisition of an insured institution without FSLIC approval. 12 U.S.C. §1730(q)(1). An applicant for such approval is required to provide the FSLIC with detailed information concerning the individuals on whose behalf the acquisition is to be made, including their identity, business background, experience, business activities and affiliations, financial status, criminal record, and involvement in any material administrative proceedings. *Id.* § 1730(q)(6)(A) and (B). Congress has specifically directed the FSLIC to "conduct an investigation of the competence, experience, integrity, and financial ability of each person" on whose behalf the proposed acquisition is to be made and to make an independent determination of the accuracy and completeness of the information submitted on behalf of such persons. *Id.* § 1730(q)(B)(i) and (ii). The FSLIC may disapprove a proposed acquisition if it finds that "the competence, experience, or integrity of any acquiring person or any of the proposed management personnel indicates that it would not be in the interest of the depositors of the institution or in the interest of the public to permit such person to control an institution." *Id.* §1730(2)(q)(7)(D).

By the same token, Congress has authorized duly appointed Supervisory Agents to act broadly in the agency's interests in order to insure the competency and integrity of management at new banking institutions. See, 12 U.S.C. 1726(c). When new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new

entity's *bona fides*. See generally, 12 C.F.R. 571.6. The Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.*

2. While Congress has sounded the same theme throughout its banking statutes, *i.e.* prevention of corruption and dishonesty, it has not provided remedies for all actions taken with respect to bank officers which may be deemed by those the officers to be adverse. When the FSLIC believes that an officer or director of an insured institution has evidenced personal dishonesty, violated any law, rule, regulation, or final cease-and-desist order, participated in any unsafe or unsound banking practice, or breached his fiduciary duty to the institution, the FSLIC may order an immediate suspension of that person from office and institute proceedings to remove him permanently from the thrift industry. 12 U.S.C. § 1730(g) (1) and (2).[14]

In such circumstances, Congress has laid out a careful and comprehensive statutory scheme prescribing varying levels of review for each of the FSLIC actions just described. An adverse agency decision under the change in control provisions may be contested at a formal on-the-record administrative hearing, followed by judicial review at the appellate level. 12 U.S.C. § 1730(q)(4) and (5). Similarly a notice of intent to remove an officer or

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[14] The agency has the same duty when a thrift officer or director has been indicted or otherwise charged with a crime involving dishonesty or breach of trust. *Id.* § 1730(h).

director can be challenged at a formal administrative hearing, with judicial review of a final removal order. *Id.* § 1730(g)(5). An officer or director subjected to an immediate suspension order may apply to the appropriate district court for a stay of such order pending completion of the administrative proceedings. *Id.* § 1730(g)(6). A removal or suspension order based on an indictment or other criminal charge is subject to specified review at the administrative level. *Id.* § 1730(h)(2).

3. In the instant case, the statutory provision that authorized defendant Behrens, actions is 12 U.S.C. § 1726(c), which governs applications for FSLIC insurance. In that section, as in those described above, Congress' concern for the soundness of the thrift system and the character and quality of management is again apparent. In Section 1726(c), Congress expressly directed the FSLIC to "reject the application of any applicant [for FSLIC insurance] if it finds that * * * [the applicant's] financial policies or management are unsafe * * * [or] that the character of management of the applicant * * * is inconsistent with economical home financing or with the purposes of this subchapter."[15]

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[15] The FSLIC's regulations governing *de novo* applicants for FSLIC insurance, such as Pioneer, were adopted to implement this statutory mandate. *See* 12 C.F.R. § 571.6(b). In accordance with the statute, these regulations require an applicant for insurance of accounts to "submit a business plan describing its management, operations, investments and financial projections for the first three years of operation. The business plan shall provide for the continuation or succession of competent management subject to the approval of the Principal Supervisory Agent. . . . " *Id.* § 571.6(b)(2)(i) (1986).

As with the change-of-control and removal powers discussed above, the FSLIC's determination to reject an application for insurance of accounts due to the character of management could also have an adverse impact on the individual officer or director involved. Significantly, however, Congress has *not* provided to the individual affected any administrative or judicial review of the FSLIC's decisions under Section 1726(c). Given its demonstrated awareness elsewhere of the interests of individual thrift officers and directors whose qualifications might be called into question, it is apparent that Congress' decision not to afford a hearing under Section 1726(c) was not inadvertent. Rather, as in the other provisions discussed, Congress' choice reflects its careful balancing of the interests of an affected individual against the need to protect the soundness of the thrift system. In this particular instance, Congress determined that the overwhelming public interest in ensuring the financial health of the FSLIC's insurance reserves justified any possible incidental burden on private interests.

Creating a *Bivens* remedy here would, therefore, stand Congress' carefully-crafted statutory scheme on its

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The requirement for supervisory approval of management is one of the routine conditions for FSLIC insurance of *de novo* institutions. Bank Board Resolution No. 84-164 (March 29, 1984), which authorized insurance of accounts for Pioneer's predecessor in interest, was expressly conditioned on the institution's agreement to employ a "qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent" for at least the first three full years of operation. Bank Board Resolution No. 84-164, page 6, ¶ 10(p) (R.E. 27).

head. "When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Chilicky*, 108 S. Ct. 2468.

C. Plaintiff may argue, of course, that since the statute provides no administrative remedy for the failure to approve a *de novo* bank's choice of president, the courts should imply such a remedy via *Bivens*. Yet it has long been settled that the adequacy of a remedy, indeed the existence or non-existence of a statutory remedy, is not relevant when a court is applying the special factors analysis. The Supreme Court in *Chilicky* held that once the special factor has been found, *it is irrelevant* whether the plaintiff has an adequate administrative remedy under the statute. This Court in *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989), recognized the force of *Chilicky*, Reversing its earlier position on the availability of a *Bivens* remedy,[16] this Court squarely held that "[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment, because 'Congress is the body charged with making the inevitable compromises required in the design of a massive and complex program.' " *Id.* citing *Chilicky*, 108 S. Ct. at 2470-71. More recently, in *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), this Court ruled that "*Chilicky* emphasized the

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[16] See *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), *vacated and remanded*, 108 S. Ct. 2861 (1988).

comprehensiveness of the [the statute at issue] and indicated that courts should defer to the expertise of Congress in matters such as the adequacy of remedial mechanisms provided by statute."

Finally, only one month ago, this Court applied *Chilicky* in *Le Bid*, holding that the IRS statute barred *Bivens* relief. In its ruling, the Court cited the observation of the Supreme Court in *Bush v. Lucas* that Congress is in "in a better position to decide whether or not the public interest would be served by creating [Bivens liability]." *Le Bid*, Slip op. at 974, quoting *Bush*, 462 U.S. at 390. This trenchant observation is most applicable here. Congress, in regulating the nation's thrift industry, has not inadvertently determined that the public interest is best served by a statute which affords remedies to officers and directors of banks who are removed, but not to mere applicants who not approved for their positions. Under this Court's precedents, and those of the Supreme Court, the special factor of Congress' comprehensive regulation of the thrift industry thrift indicates that no Bivens remedy is available to the plaintiff. On this point too, the district court erred.

III.

DEFENDANT BEHRENS WAS ENTITLED TO QUALIFIED IMMUNITY

Even if the plaintiff had a *Bivens* remedy, the federal defendant is nonetheless entitled to qualified immunity from suit.

The Supreme Court has made it clear that government officials "generally are shielded from liability for

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court reiterated this principle. The question a court must ask in a case raising qualified immunity is whether a reasonable official "in light of clearly established law and the [factual] information [he] possessed," could reasonably have believed that his behavior was lawful. Under this test it is evident that the district court erred in its assessment of the Behrens' entitlement to immunity. Behrens was only prudently carrying out the duties of his office; he could not have reasonably believed that he was acting illegally.

A. As a threshold matter we note that Behrens did not fire Pelletier; he merely wrote to the Pioneer bank, stating that because Pelletier was under investigation on quite serious charges, the agency was "unable at this time to proceed with the application until that inquiry is complete." (R.E. 28). Prudence required that Pelletier "step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete." *Id.* It was Pioneer, not Behrens, that subsequently decided it would be best to fire Pelletier, rather than await the ultimate outcome of the FSLIC investigation.

This fact by itself should answer the argument that Behrens is not entitled to immunity. Behrens took no action violative of constitutional rights, but simply carried out the statutory and regulatory requirements of his office. Therefore, he *a fortiori* took no action which he

reasonably should have known violated plaintiff's clearly established rights.

B. Behrens' lack of culpability, and the reasonableness of his actions, is evident from the regulatory scheme under which he operated. When new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Acting on behalf of the FSLIC, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.* In this case the bank in question, Pioneer Savings & Loan, had a predecessor in interest named South Coast Savings & Loan Association. South Coast had received Board approval for insurance of its accounts, but one of the conditions of approval was that the institution:

> provide for employment of a qualified fulltime executive managing officer, subject to approval by the Principal Supervisory Agent * * * . In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following * * * *the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval.* [R.E. 27] (Emphasis Added)

Since Pioneer was required to obtain approval of its new president-designate from the Principal Supervisory Agent, who delegated his authority to Supervisory Agent

Behrens, and since Behrens was charged by statute and regulation with rejecting an applicant for insurance, or its appointees, if the character of the management is "questionable," it should be clear that Behrens was not only acting reasonably, but pursuant to statute and regulations, (as well as the agreement with Pioneer's predecessor in interest) when having learned of the ongoing FSLIC investigation of a bank Pelletier had served as a senior loan officer, he declined to approve him as President "at this time."

C. Pelletier had no clearly established property rights in his potential permanent employment with Pioneer. The point was well made by the Fifth Circuit in its recent decision in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989). In a factual situation remarkably similar to the one here, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established property right in employment where the employment was "contingent upon regulatory approval."

Similarly, in *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 479 U.S. 885 (1986) an unsuccessful applicant for an administrative law judge position brought suit alleging a due process violation. He was rebuffed by the D.C. Circuit, which held that "[t]he right to a hearing does not attach every time the government denies an employment application."

Here, of course, it was the private party, Pioneer, which ultimately decided to fire Pelletier, rather than await the outcome of the FSLIC investigation. Behrens only advised that he could not approve Pelletier as president "at this time." In these circumstances, it its absurd to contend that on the basis of the information known to him at the time, Behrens should reasonably have understood that by writing the letter to Pioneer he was violating clearly established law.[17]

D. Plaintiff asserts not only a violation of procedural due process, but a violation of a liberty interest. However, his complaint fails to allege any specific acts committed by Behrens which denied him liberty. Plaintiff

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[17] This Court's decision in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987), holding that an individual may have a property interest in private employment, is not controlling. In *Mackey*, the Court found that the plaintiff had a legitimate claim of entitlement to his job based on state law. In this case, the plaintiff has never asserted more than a "reasonable expectation" that he would be approved as president of Pioneer. Moreover, in *Mackey* the Court suggested that the defendant was acting outside the scope of his employment; here Behrens was authorized by statute and regulation to do what he did.

Also, in *Mackey* the defendant ordered the plaintiff fired; here there was no such order – the defendant merely declined to approve the plaintiff while the FSLIC investigation was continuing.

Finally, the *Mackey* ruling post-dates the Behrens letter in the instant case, which was written in 1986; there was a vigorous dissent in *Mackey*, over the existence of a property interest in private employment, which casts doubt on whether the law was clearly established; and the *Mackey* case is again pending before this Court on the immunity issue (Nos. 89-35233, 89-35270), hence there is the possibility of a reversal on the immunity issue.

makes only the very general and unsupported charge that all the defendants engaged in a continuing conspiracy to prevent plaintiff from finding employment in the financial institutions industry.

Unfortunately, the plaintiff cannot make this sort of claim carry him past the motion to dismiss or summary judgment stage of a qualified immunity suit. This Court has repeatedly held, most recently in *Di Martini v. Ferrin*, where similar allegations were made, that "a plaintiff is not entitled to survive on vague assumptions [about the loss of employment opportunities]" not supported by specific allegations in his complaint. 889 F.2d at 927. This is in keeping with the general rule that "[m]ere allegations, without more, do not create a question of fact as to qualified immunity." *Ginter v. Stallcup*, 869 F.2d 384, 388 (8th Cir. 1989). See generally, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). See also, *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 931 (7th Cir. 1989).

Furthermore, in *Connelly*, the Fifth Circuit rejected the plaintiff's asserted liberty interest in "pursuing work in his chosen vocation," expressly declining to decide if such a constitutional right exists. 786 F.2d at 1214. That the court found the law unsettled on this issue conclusively establishes that Behrens cannot have violated a clearly established right, even if he acted in concert to keep Pelletier out of the thrift industry. Under *Connelly's* reasoning, Behrens is entitled to qualified immunity on all facets of the constitutional claims.

Finally, it is well-established that before the government can be accused of infringing a liberty interest, it

must be shown not only that any information surrounding a dismissal of an employee was sufficiently damning, but that the government participated in the dissemination of this information to the public. See, *Bishop v. Wood*, 426 U.S. 341, 348 (1976). The letter in dispute from Behrens to the Pioneer bank, was marked "confidential," and was not disseminated to anyone. Nor does the plaintiff allege dissemination. Therefore, no liberty interest was violated.

E. The district court's denial of qualified immunity may have resulted from doubts over Behrens' employment status.[18] Behrens was not paid by the federal treasury, but by the Federal Home Loan Bank of San Francisco, a privately owned, quasi-governmental entity. However, this does not affect his status as a Supervisory Agent of the Board. Under Section 17(a) of the Federal Home Loan Bank Act, 12 U.S.C. 1437(a), the Bank Board has authority to delegate certain of its supervisory and examination functions to persons who are officers and employees of the regional banks (not to the regional banks themselves). The delegation of authority is formally carried out by the "Principal Supervisory Agent," and those who are delegated these powers are denominated "Supervisory

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[18] The lower court's September 11, 1989 order states that "although Behren may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." (R.E. 29). The October 6, 1989 order denied the motion for summary judgment as premature, "given the status of discovery." (R.E. 32). Read together, the orders seem to indicate that the court rejected qualified immunity because it perceived factual issues relating to whether Behrens acted as a private party.

Agents." See, 12 C.F.R. 501.10. Board regulations expressly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." *Id.* Therefore, Behrens was an agent of the United States and entitled to qualified immunity.

We recognize that in *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989), this Court refused to accord private parties a qualified immunity defense. However, the decision in *Trotter*, for the reasons we have just enumerated, has no applicability here. *Trotter* involved a private engineering firm's study of the lands surrounding a naval air station in Hawaii. The owners of those lands claimed that the study and the actions it recommended "impacted and blighted" their property. 869 F.2d at 1313. Noting that the Supreme Court has not decided whether to accord private defendants immunity in 1983 and *Bivens* suits, the Court extended its earlier statement, in *Howerton v. Gabica*, 708 F.2d 380, 385 n. 10 (9th Cir. 1983), that private defendants in 1983 suits are not eligible for qualified immunity.

This case is much different than *Trotter*. Behrens was not a government contractor performing an assigned task, but a duly appointed Supervisory Agent clothed with a federal agency's authority. As we have already emphasized, he was carrying out federal functions pursuant to federal regulations and statutes. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He is thus in a position to claim qualified immunity from suit – an immunity which

this Court, on the basis of the arguments made above, should grant him.

That Behrens was a federal employee is evident not only from the factors we have just discussed, but also from the factors discussed in Point I, *supra*, at 21-23, in the context of substitution of the United States as defendant under the Westfall statute. Plainly, Behrens is not a federal employee for one purpose and not for another – for absolute immunity and not for qualified immunity. By statute, by regulation, by case law, he is a federal employee fully entitled to immunity from both common law and constitutional torts.[19]

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[19] The district court ruled that the two actions forming the basis of the plaintiff's complaint – the letter written by Behrens and his subsequent firing by Pioneer bank – were time barred under the applicable California one year statute of limitations. See, Cal. Civ. Proc. Code, Section 340(3); *Keller v. United States*, 667 F. Supp. 1351, 1360 (S.D. Cal. 1987). The statute of limitations issue is not presently before this Court. However, we note that there is Ninth Circuit precedent casting some doubt on the limitations ruling below. See, *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989). The precedent of this Circuit, however, runs counter to the weight of judicial authorities from other courts. See, *Wilson v. Garcia*, 471 U.S. 261 (1985); *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 2099 (1989); *Chin v. Bowen*, 833 F.2d 21 (2d Cir. 1987); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed.

Respectfully Submitted,

STUART M. GERSON
Assistant Attorney General

ROBERT L. BROSIO
United States Attorney

BARBARA L. HERWIG
(202)/FTS 633-5425
RICHARD A. OLDERMAN
(202)/FTS 633-3542
Attorneys, Appellate Staff
Civil Division. Room 3631
Department of Justice
Washington, D.C. 20530-0001

MARCH 1990

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[Statutory Addendum Omitted In Printing]

COURT OF APPEALS' ORDER DENYING STAY, EOD MARCH 14, 1990

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al. Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 DC # CV-89-0969-RMT Central California ORDER (Filed Mar. 14, 1990)

Before: WALLACE and LEAVY, Circuit Judges

Appellant's motion to stay the September 11, 1989 and October 6, 1989 district court orders are denied. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328, 464 U.S. 879 (1983).

PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION, EOD APRIL 17, 1990

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER

Plaintiff-Appellee,

vs.

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT M. TAKASUGI

DIST CT NO. CV 89-0969-RMT (Tx)

BRIEF OF APPELLEE ROBERT J. PELLETIER

SAMUEL T. REES
Suite 700
626 Wilshire Boulevard
Los Angeles, California 90017
Telephone: (213) 688-4841

Attorney for Appellee
Robert J. Pelletier

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee vs. JOHN W. BEHRENS, Defendant-Appellant.	NINTH CIRCUIT NO. 89-56265 CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx)

CERTIFICATE OF INTERESTED PARTIES
REQUIRED BY NINTH CIRCUIT RULE 28-2

The undersigned, counsel of record for Robert J. Pelletier certifies that the following have an interest in the outcome of this case:

1. Robert J. Pelletier, Plaintiff
2. John W. Behrens, Defendant
3. United States of America, Defendant
4. Federal Home Loan Bank Board, Defendant
5. Federal Home Loan Bank of San Francisco, Defendant
6. Federal Savings and Loan Insurance Corporation, Defendant in related case pending in the Court below.

Dated: April 12, 1990

LAW OFFICES OF SAMUEL T. REES

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorney for Plaintiff-Appellee
Robert J. Pelletier

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee vs. JOHN W. BEHRENS, Defendant-Appellant.	)	NINTH CIRCUIT NO. 89-56265 CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx)

BRIEF OF APPELLEE ROBERT J. PELLETIER

STATEMENT OF ISSUES PRESENTED

Plaintiff and Appellee Robert J. Pelletier does not agree with the Brief of Defendant and Appellant John W. Behrens regarding the "questions presented" and submits the following:

1. Does this Court have jurisdiction to determine any of the questions presented in the Brief of Appellant?

2. Did the Court below commit error when if failed to find on a motion to dismiss or motion for summary judgment before discovery that Behrens was not entitled to qualified immunity?

3. Is Behrens and/or his counsel subject to sanctions and Pelletier's attorneys' fees and costs by (i) failing to reference his brief to the Record on Appeal as required by Ninth Circuit Rule 28-2 and *Mitchel vs General Elec. Co.*, 689 F.2d 877 (9th Cir. 1982) and (ii) presenting issues which are not the proper subject of an interlocutory appeal pursuant to 28 *U.S.C.* § 1927?

STATEMENT OF JURISDICTION

Jurisdiction exists in the District Court pursuant to 28 *U.S.C.* § 1331; 5 *U.S.C.* § 552A(g)(1); 5 *U.S.C.* § 702; 12 *U.S.C.* § 1431 and 1437; 28 *U.S.C.* § 2201 and 2202; and pendant jurisdiction.

Behrens appeal brief attempt to raise three issues for appeal to this Court. Only a part of one of the issues is properly before this Court.

The issue properly before this Court is the issue of qualified immunity. The United States Supreme Court

and this Court has held that there is a narrow review of the issue of qualified immunity in the case of an interlocutory appeal taken before any trial has occurred. *Mitchell vs. Forsyth*, 472 U.S. 511, 527-530 (1985) and *Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach*, 881 F.2d 816, 817-818 (9th Cir. 1989). That issue is whether defendants' conduct actually violated clearly established statutory or constitution rights when the facts are in dispute.

Pelletier asserts that there is no jurisdiction on the other issues raised in the Brief of Appellants. A detailed discussion of this position is set forth at the commencement of the Argument, below.

STATEMENT OF THE CASE

Nature of the Case

This brief is submitted by Plaintiff and Appellee Robert J. Pelletier ("Pelletier") in response to the brief of Defendant and Appellant John W. Behrens ("Behrens"). The underlying action is one seeking injunctive relief and damages arising out of Behrens' causing Pelletier to be fired from his job and blackballed from the thrift industry. The complaint alleges claims for violations of Constitutional rights, federal laws and common law torts.

This is an appeal by Behrens from the denial of his motion to dismiss the complaint and for summary judgment before discovery. (Clerk's Record 31). The motion to dismiss was granted in part and denied in part by the Court below and the motion for summary judgment was denied without prejudice as premature. (Excerpt P. 31).

No meaningful discovery has yet been taken in this action. Rather, Behrens has gone so far as to evade service of process for discovery. (Clerk's Record 15).

The question for review is whether Behrens will be permitted to escape personal responsibility for his actions which caused Pelletier to be summarily fired from his position as the managing officer of a savings and loan association and thereafter to be blackballed from further employment in the industry. Essentially, Behrens, claiming to have been acting on behalf of a governmental agency but without authority to do so, destroyed Pelletier's career in the financial institution field by taking action without explanation, evidence or any kind of due process, all of which would have been required were the governmental agency to have taken the action itself.

Behrens pursues this appeal in order to eliminate through the back door certain claims found by the Court below to have been stated against him which claims are not permitted against the governmental defendants below. Essentially, these are claims for intentional torts, punitive damages and interference with contract all of which are barred against the governmental defendants. If Behrens is successful, Pelletier will lose his ability to recover on these claims against the governmental defendants. Behrens omits this discussion of the true motive for this appeal and the effects thereof.

Behrens admits by his brief that he is neither a federal officer or even a federal employee. Rather, he is a private party who at the time was employed by the Federal Home Loan Bank of San Francisco ("Bank") to perform certain supervisory duties delegated to the Bank

by the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FHLBB and the FSLIC are both federal agencies.

This Court has recently held that a claim for qualified immunity is not available to a private party such as Behrens. *F.E. Trotter, Inc. vs. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989). Additionally, substitution of the United States of America is not available to private parties who commit willful torts since such torts are outside the scope of any relationship which would allow for substitution.

Statement of Facts

The facts are contained in the First Amended Complaint (Excerpt P. 1 et seq.) and/or Behrens' opening brief herein. References are to paragraphs in that amended complaint or page numbers of that brief.

Pelletier has pursued a profession and held employment in the savings and loan industry in various executive capacities for over thirty years and until Behrens took the action which continues to cause him to be unable to be employed in that industry even to this day. (Complaint ¶ 8). While it is true that this industry is the subject of much criticism today, the problems of this industry are not of Pelletier's conduct and he should not be required to come before this Court as a second class citizen stripped of his Constitutional rights.

In 1980, Pelletier was an officer of Beverly Hills Savings and Loan Association ("BHSL"). He served as the

Senior Vice President in charge of the Major Loan Division of BHSL and the Senior Loan Committee until his resignation in March, 1984. This resignation was given because Pelletier did not wish to relocate his office as requested by BHSL. Pelletier was never a member of the BHSL Board of Directors nor was he ever the managing officer of that institution. (Complaint ¶ 9-13).

While BHSL was subsequently seized by the FSLIC for insolvency in April, 1985, Pelletier was not the subject of any administrative or legal action at the time Behrens committed the acts alleged in the complaint. It also does not appear that Behrens played any role in supervising BHSL, while Pelletier was employed. (Excerpt P. 20).

Behrens at this time was a salaried employee of the Bank. He was not then nor at any times alleged in the complaint an employee of the FHLBB or the FSLIC. On March 17, 1984, about the time of Pelletier's departure from BHSL, Behrens was appointed an agent of the FHLBB and FSLIC. The scope of his delegated duties is set forth in 12 *C.F.R.* § 501.11. This authority does not permit Behrens to fire savings and loan executives, although FHLBB/FSLIC has such authority by statute. 12 *U.S.C.* §§ 1730 (g),(h) and (q).

In mid-1984, Pelletier was hired by Equitable Savings and Loan Association of Orange County as its managing officer. Pelletier's employment was approved by both federal and state regulatory offices. Pelletier remained in this capacity until he was again asked to relocate his home in 1985. (Complaint ¶ 14-16).

Pelletier was then hired by Pioneer Savings and Loan Association ("Pioneer") of Orange County as its managing officer. Pioneer had received insurance of its accounts from the FSLIC in 1984. Although there is no statutory authority for doing so, the FSLIC purported to require that Pioneer secure approval of any new managing officer by the Principal Supervisory Agent for the district of the FHLBB and FSLIC for a period of three years. The Principal Supervisory Agent in Pioneer's district was James Cirona, the president of the Bank. Behrens has never been a Principal Supervisory Agent. (Excerpt P. 20-27 ¶ (p)).

Pelletier's work and performance while at Pioneer was well received by not only the federal and state regulatory agencies, but also Pioneer's Board and outside accountants, Peat, Marwick, Mitchell & Company. (Complaint ¶ 17).

As noted above, there is no statutory authority for imposing a condition subsequent to the issuance of insurance of accounts of managing officer approval. The statutory right of approval is *before* the insurance of accounts is granted. FSLIC has the right, however, to terminate such insurance in the event of unsafe or unsound conditions at that institution. FSLIC has never contended that Pelletier's performance at Pioneer placed Pioneer in an unsafe or unsound condition and indeed makes no criticism of Pelletier's performance while at Pioneer.

Nevertheless, Pioneer sought approval of Pelletier's position from the Principal Supervisory Agent, Mr. Cirona. Mr. Cirona took no action on this application for a material period of time. (Complaint ¶ 18). Indeed, Mr. Cirona has not to this date, that Pelletier is aware, taken

any action on this application. In his brief, Behrens asserts that his conduct was in response to the application. (Brief P. 33).

In May, 1986, Behrens, acting outside of his lawful authority and with the knowledge and intent that his acts would destroy Pelletier's career in the industry, wrote a letter to the Pioneer Board (the "Behrens Directive"). Fairly read that Directive required Pioneer to terminate Pelletier if he did not resign and replace him, without delay, with a new managing officer. (Excerpt P. 28 and Complaint ¶ 21). It is unknown at present what other acts were taken by Behrens to accomplish his purpose. Behrens has refused to submit to discovery, even going so far as to move this Court for a stay pending appeal, which was denied on March 14, 1990. (Interestingly, Behrens moved for summary judgment in the Court below while also refusing to submit to discovery so that factual opposition could be presented. Fairly read, the denial of summary judgment was made to permit discovery and not on the merits.)

The Behrens Directive does not set forth a single act of wrongdoing by Pelletier. It does not criticize his performance while at Pioneer for approximately one year. It says that Pelletier is being investigated for his role in BHSL, which by that time had been seized. It thus implies that Pelletier was one of the causes for BHSL's collapse. Since the FHLBB on whose stationary Behrens wrote his Directive has the power of life and death over the institution, Pioneer took the prudent step of firing Pelletier, when he refused to resign. (Complaint ¶ 21).

Congress has provided a mechanism for removing a savings and loan officer. 12 *U.S.C.* §§ 1730 (g),(h) and (q). This mechanism requires a determination by the FHLBB/ FSLIC, itself, and administrative due process to the individual affected. This mechanism has not been followed and Pelletier's attempts to secure a prompt administrative trial has been denied. (Complaint ¶ 23).

Pelletier, alone, has been singled out for this improper treatment. (Complaint ¶ 28). As a result, Pelletier has been effectively blackballed in the industry and can not secure employment. (Complaint ¶ 24-27).

Pelletier filed this action on February 17, 1989. (Excerpt P. 39). Following rulings on Behrens' motion to dismiss, the Court below found that the following claims had been stated against Behrens. Certain of the claims, where applicable, seek punitive damages.

A. Claims One and Two insofar as they assert acts subsequent to the Behrens Directive for violations of Constitutional rights to procedural and substantive due process. These are the Bivens Claims.

B. Claim Three for injunctive relief for violation of the Administrative Procedures Act, 5 *U.S.C.* § 701-706.

C. Claim Five for interference with contract under California law.

D. Claims Six and Seven for intentional and negligent infliction of emotional distress for acts subsequent to the Behrens Directive under California law.

E. Claim Eight for negligence under California law.

ARGUMENT

Limited Jurisdiction Exists in this Court

Behrens appeal brief attempt to raise three issues for appeal to this Court. Only a part of one of the issues is properly before this Court.

The issue properly before this Court is the issue of qualified immunity. The United States Supreme Court and this Court has held that there is a narrow review of the issue of qualified immunity in the case of an interlocutory appeal taken before any trial has occurred. *Mitchell vs. Forsyth*, 472 U.S. 511, 527-530 (1985) and *Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach*, 881 F.2d 816, 817-818 (9th Cir. 1989).

This jurisdiction was criticized by this Court in both *City of Manhattan Beach*, supra, and *Schwartzman vs Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988). Similar criticism is applicable to this appeal which also appears to be a frivolous, knee-jerk reaction to the lower Court's order. Accordingly, Pelletier seeks his reasonable attorneys' fees and costs incurred in connection with this appeal in the sum of $10,000 pursuant to 28 *U.S.C.* § 1927.

As this Court held in *City of Manhattan Beach*, supra:

> [O]ur task is not to determine whether defendants' conduct actually violated clearly established statutory or constitution rights when the facts are in dispute. Rather the Supreme Court has said that in an interlocutory appeal from a denial of a motion for summary judgment on qualified immunity, our inquiry should be limited to deciding whether the "legal norms allegedly violated by the defendant were clearly

established at the time of the challenged actions."

Pelletier is at a loss to determine how this Court can even go about this task in the face of a total lack of record citations as required by Ninth Circuit Rule 28-2. Apparently, Behrens expects that this Court will review the entire record to determine what action was or was not taken in the Court below.

This Court is aware that Behrens filed both a motion to dismiss and a motion for summary judgment. (Excerpt P. 31). What this Court is not able to tell from the lack of record citations is the basis for seeking such relief. The motion is not referenced in the Brief of Appellant. This Court is left to guess at the arguments asserted by Behrens in the Court below, particularly since the lower Court's order does not address qualified immunity by Behrens but only the sovereign immunity claim of the USA and FHLBB. (Excerpt P. 31 et seq.).

It is also clear that the Court below did not decide the issue of qualified immunity *as a matter of law* in ruling on the motion for summary judgment. Rather, the Court below held that "[g]iven the status of discovery herein, it is premature for the court to consider defendant Behrens' motion for summary judgment. (Excerpt P. 32).

Accordingly, if there is any determination on qualified immunity in the Court below, it must be found, if at all, in the ruling on the motions to dismiss attached as part of the Excerpts.

Behrens has not cited to this Court any authority for the proposition that an interlocutory appeal may be taken from an adverse ruling on a motion to dismiss claims

based upon qualified immunity. In *Forsyth*, the Supreme Court was faced with an appeal by a defendant who had lost a motion for summary judgment, which found no qualified immunity as a matter of law. In *City of Manhattan Beach*, this Court affirmed a denial of summary judgment which required a trial of the issues.

Nevertheless, Pelletier will discuss the merits of this issue below.

Another issue sought to be raised by Behrens in this appeal is whether the Court below erred in denying his motion to substitute the USA under the Westfall Act. 28 *U.S.C.* § 2679. The first problem again faced by this Court is to find where in the record Behrens made any such motion and where in the record the lower Court denied any such motion and committed error in doing so. This is a Court of review and not a Court of first impression.

Secondly, Behrens cites this Court to no authority to support his contention that such a denial of substitution is immediately appealable. Rather, Behrens asks the Court to consider two alternatives. The first is that the motion to substitute is tantamount to a defense of qualified immunity. It is not. It should merely change the parties without otherwise effecting the relief granted. Undoubtedly, the USA would assert that if substituted for Behrens, many of Pelletier's tort claims would have to be dismissed because the USA is immune from such suits.

The second alternative suggested by Behrens is that there is some pendant jurisdiction in this Court. At a time when this Court criticizes jurisdiction over interlocutory appeals from denial of claims for qualified immunity, this Court should not expend such jurisdiction to allow the

issue to be repeatedly appealed from denials of various motions.

Nevertheless, Pelletier will discuss the merits of this issue below.

Finally, Behrens asks this Court to assume jurisdiction to decide whether the pervasive regulation of savings and loans bars Bivens claims. Again, there is no record references to this Court to support such an argument. The absence of the moving papers reference and the absence of a reference to an order of the Court below on this issue essentially requires this Court to become a Court of first impression. In any event, Congress' pervasive regulation of the thrift industry provides a mechanism for removing a thrift official which, if followed, would have avoided the Bivens claims asserted by Pelletier. 12 *U.S.C.* §§ 1730 (g),(h) and (q).

Accordingly, Pelletier respectfully requests that this Court dismiss the appeal for lack of jurisdiction and for the failure of Behrens and his counsel to support his assertions by reference to the record for the limited appellate review available. Again, Pelletier seeks his reasonable fees and costs incurred in the appeal in the sum of $10,000.

Behrens Conduct Violated Clearly Established Rights

As noted above, the standard for review of an interlocutory denial of qualified immunity is extremely narrow. Essentially, this Court must decide whether a clearly established right could have been violated by the alleged conduct. See *Forsyth* and *City of Manhattan Beach*, supra.

Pelletier submits that he had such a right in the continued employment by Pioneer and future employment in the industry.

Since this Court is being asked to make a *de novo* review of the denial of a motion to dismiss, the same rules governing the Court below should govern such a review by this Court. Motions to dismiss for failure to state a claim are disfavored. *United States vs. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) and *De La Cruz vs. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). This Court should also assume all allegations of the complaint are correct and should construe the complaint in the light most favorable to Pelletier. *Shah vs. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir. 1986); *Bergquist vs. Count of Cochise*, 806 F.2d 1364, 1367 (9th Cir. 1986); *City of Redwood City*, supra at 966; and *Tormey*, supra at 48. Thus, to dismiss a complaint by motion to dismiss, it must be "beyond doubt" that Pelletier can state no facts, which would support his claims.

It is particularly important that Constitutional questions not be decided summarily. *Adickes vs. S.H. Kress & Co.*, 398 U.S.144 (1970) and *Pacific American Fisheries vs. Mullaney*, 191 F.2d 137 (9th Cir. 1951).

In *Scheuer vs. Rhodes*, 416 U.S. 232 (1974), the Supreme Court reviewed a summary judgment granted on the grounds of absolute immunity from suit of certain Ohio state officials. The case arose out of the well-publicized "Kent State" shootings in May, 1970.

A unanimous Court held that the state officials had only a claim of "qualified" immunity. The Chief Justice

went on to state as follows regarding a motion for dismissal on the grounds of qualified immunity.

> If the immunity is qualified, not absolute, the scope of the immunity will necessarily be affected by facts not established either by affidavits, admissions or a trial record.

Rhodes, supra at 243.

> Continuing, The Court stated that the plaintiffs are entitled to be heard more fully than is possible on a motion to dismiss a complaint when the defendant has only qualified immunity.

Rhodes, supra at 250.

Courts in this Circuit have followed the rule that qualified immunity involves questions of fact and is *not* a bar to suit in *Keker vs. Procunier,* 398 F.Supp. 756 (E.D. Cal. 1975).

> *Scheuer v. Rhodes, supra,* held that since the question of qualified immunity is a factual inquiry, it is not properly tested on a motion to dismiss. Accordingly, the qualified immunity envisioned by *Scheuer v. Rhodes, supra,* is appropriately raised as a defense, and is not a bar to suit.

Procunier, supra at 767. See also *Morrison vs. Jones,* 607 F.2d 1269, 1274 (9th Cir. 1979) and *Greenlaw vs. California Department of Benefit Payments,* 413 F.Supp. 420, 426 (E.D. Cal 1976)

Even were the defense of qualified immunity available to Pelletier as a private citizen (see infra), he would not be able to avail himself of it. The Behrens Directive is so flatly contrary to long-established law that no immunity can protect him for his role in issuing it.

The right to freely pursue one's profession without unreasonable governmental interference is long established under the United States and California Constitutions.

Behrens appears to argue that federal officials can without any procedural protection "blackball" someone from working in the industry of his choice and destroy an income-producing career which a person has created over thirty years.

> The law is contrary, of course. The right to hold specific *private* employment and to follow a chosen profession free from unreasonable government interference comes within the "liberty" and "property" concepts of the Fifth Amendment. . . .

Greene vs. McElroy, 360 U.S. 474 at 492 (1959). See also *Merritt vs. Mackey,* 827 F.2d 1368, 1370 (9th Cir. 1987) and *United States vs. Briggs,* 514 F.2d 794, 798 (5th Cir. 1975).

The fundamental principal was established as long ago as 1915, in a case involving threats to employers who hired aliens. The Supreme Court established that the government can not arbitrarily threaten a person's livelihood by threats against his employer. *Truax vs. Raich,* 239 U.S. 33 (1915).

The most often cited case on Constitutional rights to employment and profession involves an engineer whose executive position in the defense industry was taken from him through the revocation of his security clearance based on Constitutionally defective hearings. (Pelletier was not given any hearings in this matter).

The Supreme Court held that the federal government can not deprive someone of his private occupation and profession by revoking such clearance based on accusations which the government prevents him from confronting. *McElroy,* supra. This decision has provided a foundation for other decisions holding unconstitutional arbitrary government action that impairs such employment.

Government action that impairs a person's ability to obtain employment by publicly labelling him as an excessive drinker is unconstitutional. *Wisconsin vs. Constantineau,* 400 U.S. 433, 435-436 (1972).

The above principals of law are thus clear and well established. Pelletier's allegations against Behrens can readily be seen to rest safely under the umbrella of Constitutional protection provided by these principles.

Application of these principles to similar facts has not been difficult. This Court had no trouble determining that it was unlawful for government evaluators to threaten a non-profit government-funded agency with cancellation of its contracts if it did not fire an employee. *Mackey,* supra. The Court held that plaintiff's interest in his employment was not changed because the employer, not the federal officials, fired the employee. A federal official who sets in motion a series of acts which he should know would cause a Constitutional injury may be held liable for a Constitutional tort. *Mackey,* supra at 1371-72.

Briggs, supra, involved a similar claim where individuals were labeled "unindicted co-conspirators" effecting their employment opportunities.

California courts, as well, have firmly protected citizens from arbitrary government threats to their employment and profession. One important case has nearly identical facts. *Endler vs. Schutzbank*, 68 Cal.2d 162 (1968).

In *Schutzbank*, the California Corporations Commissioner forced a licensee to terminate an executive and warded other licensees that he would revoke their licenses if they employed that executive. The executive had been accused of dishonesty but never given a hearing on the charges. The California Supreme court held that the *threat* was a plain violation of the executive's Constitutional rights. See also *Townsend vs. Los Angeles County*, 49 Cal.App.3d 263, 267 (1975) and *California Constitution*, Art 1, § 1.

Mr. Pelletier's right to pursue his employment and profession free from arbitrary or unreasonable governmental interference has long been established in California law. A long line of cases refutes Behrens' argument that Pelletier has no property right in his employment or profession in California law. See *California Constitution*, Art 1, § 1; *New Method Laundry Co. vs. MacCann*, 174 Cal 26, 31 (1916); *Purdy & Fitzpatrick vs. State of California*, 71 Cal.2d 566, 579 (1969); *Bautista vs. Jones*, 25 Cal.2d 746, 749 (1945); *KGB, Inc. vs. Giannoulas*, 104 Cal.App.3d 844, 849 (1980); and *County of Los Angeles*, supra.

Behrens' violations of Pelletier's clearly established statutory rights are equally patent. Under the Privacy Act, 5 *U.S.C.* § 552a(g)(1)(C) and § 552a(g)(4), it is unlawful for an agency to make a determination adverse to an individual's rights absent an adequate agency record. No record of any agency action is present in this case.

The Home Owners Loan Act of 1933, at 12 *U.S.C.* § 1464(d)(4) and § 1730(b), (e) and (g), provide specific detailed procedural requirements for the removal of a savings and loan executive by the government. These procedures and safeguards were not followed at all.

Pelletier alleges that the Behrens Directive has deprived him both of a specific job and of employment in his chosen profession, without opportunity for a hearing and without good cause. The Directive contains an actual threat of injury to Pioneer, and an implied threat of FHLBB retaliation against any thrift who hires Pelletier. The Directive presents a continuing cloud on Pelletier's professional reputation. His Fifth Amendment interests are clear.

Qualified Immunity is Not Available to Behrens

This Court has recently held that "qualified immunity is not available as a defense to private parties in a *Bivens* suit" and that "private parties are not entitled to qualified immunity for *Bivens* claims." *F.E. Trotter, Inc. vs. Watkins*, 869 F.2d. 1312, 1318 (9th Cir. 1989). This decision is controlling and resolves the only issue conceivably before the Court.

Behrens admits that he is a private party. He admits that he is a salaried employee of the Bank, which itself is not a federal agency. (Brief P. 10). Rather, the Bank is a federally chartered corporation whose stock is owned by its member associations in large part. (Brief P. 4-5). Indeed and until recently, the Bank derived income with which to pay Behrens' salary from charging its member thrifts for supervision/examination. This situation only

recently changed pursuant to the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 ("FIREA"), Pub. Law No. 101-73, 101 *Stat.* 183 at § 403 and 722. Thus, it took a recent act of Congress to transfer back to the Federal Government the supervision of thrifts which to that time had been accomplished by the member Banks.

Behrens claims that his conduct was that of an agent of the FHLBB. A similar claim was presented and rejected by this Court in *Watkins*, supra.

Additionally, the delegation of authority Behrens cites does not support his position. Nothing in the regulations or the FHLBB resolution (Excerpt P. 20) permitted Behrens to remove a thrift official from his job. That is a power held exclusively by the FHLBB/FSLIC. See the Home Owners Loan Act of 1933, at 12 *U.S.C.* § 1464(d)(4) and § 1730(b), (e) and (g).

To the extent that Behrens asserts that his conduct was permitted pursuant to 12 *U.S.C.* § 1726, such an assertion falls for two reasons. First, insurance of accounts for Pioneer had already been given for some period of time before the Behrens Directive and there is no authority for the proposition that it may be summarily revoked if the FHLBB/FSLIC happen not to like a new managing officer. Secondly, the approval process is to be accomplished by the *Principal* Supervisory Agent, Mr. Cirona, and not Mr. Behrens. (Excerpt P. 27).

Accordingly, each of the grounds used to support qualified immunity appears lacking and the orders of the Court below should be affirmed.

Federal Regulation Does Not Preempt the Bivens Claims

Assuming that this Court considers Behrens argument that comprehensive regulation bars Pelletier's Bivens claims, the argument made by Behrens is lacking in merit. Behrens is not entitled to absolute immunity and Pelletier has no Congressionally-approved alternative remedy for the deprivation of his Constitutional rights.

In *Carlson vs. Green*, 446 U.S. 14 (1980), the Supreme Court set forth *the* two considerations which a Court may use to deny a Bivens claim. The Bivens claim may be defeated by:

> "special factors counseling hesitation in the absence of affirmative action by Congress"

or by a showing that:

> Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the constitution and viewed as equally effective.

Green, supra at 18-19. See also *Schowengerdt vs. General Dynamics Corp.*, 823 F.2d 1328, 1332 (9th Cir. 1987).

The "special factors" identified by the Supreme Court in the first of these two considerations are those which entitle a defendant to absolute immunity from suit because he occupies an "independent status in our constitutional scheme." *Green*, supra at 19. Absolute immunity is available to legislators, judges, and prosecutors in proper circumstances, and is plainly not available to Behrens.

The *Green* court further held that qualified immunity, where applicable, provides adequate protection from Bivens claims to those not entitled to absolute immunity.

With respect to the "alternative remedy" factor, no such remedy is found in this case. Behrens argument is circuitous. He argues that there is this factor applies to avoid the Bivens claim and he then argues that Congress has provided no remedy for his actions. Apparently, Behrens would have this Court hold that no remedy is an adequate remedy. This kind of "heads I win, tails you lose" argument does not dignify the Behrens Brief or its authors.

Behrens identifies the appropriate test for hesitation in the face of a statutory remedial scheme in *Schwiker vs. Chilicky*, ___ U.S. ___; 108 S.Ct. 2460 (1988). The test is whether Congress has provided, in the legislative design, what Congress considers an adequate redial mechanism for Constitutional violations. Behrens conceded that no such remedy can be found from his assertion that this Court ignore the removal of thrift officer statute and focus on the insurance of accounts statute.

This Court has held that when Congress has provided no remedy, a Bivens claim may go forward. *Schowengerdt*, supra.

Substitution of the USA Should Not Be Ordered

Behrens apparently seeks to have this Court as a matter of first impression substitute the USA in his place in connection with the common law torts alleged by Pelletier. This of course would not remove Behrens from

the action because he would still be a defendant in the Bivens claims and the Administrative Procedure act claim. It is rather an attempt to avoid a personal judgment against him as a private citizen and cast doubt on the ability of Pelletier for recovering on his claims for interference with contract barred against the USA by the Federal Tort Claims Act and for recovering punitive damages also barred against the government.

Pelletier has asserted above that any determination in this area by the Court below is not reviewable by this Court on an interlocutory appeal. Further, the absence of any record references for review requires this Court to guess at what was or was not done in the Court below.

Behrens relies on 28 *U.S.C.* § 2679(d), as revised by Pub. Law 100-694. This new statute has not been discussed in published opinions. This Court should insist that any certification of the Attorney-General are not improvidently and casually granted. In this case, there is no record reference before this Court that such a certificate has been made. Behrens asserts that such a certificate may be made by the Director of the Torts Branch of the Justice Department. (Brief P. 9) This person is also listed as one of Behrens' trial counsel in the Court below. (Excerpt P. 35). How can the same lawyer serve as advocate and judge at the same time?

A fair reading of the Westfall Act suggests that substitution is only proper for employees. As noted above and the orders of the Court below, there exists a factual question concerning the scope of Behrens' agency authority and Bank employment. The modification to 28 *U.S.C.* § 2679 suggest that they are applicable to employees and

only if they are acting within the scope of their authority. For the reasons set forth above, it is clear that Behrens is not an employee of the government but rather is an employee of the Bank. Further, it is equally clear that the FHLBB did not delegate to Behrens the authority to make final adjudications removing a thrift officer.

28 *U.S.C.* § 2680(h) suggests that all of the provisions of the Chapter, including § 2679, do not apply to certain claims for interference with contract. This being the case, Behrens should not be permitted to seek substitution for this claim just as he can not seek substitution on the Bivens and Administrative procedure Act claims. To construe the statute otherwise, again creates a circular argument.

California law is clear that to the extent that common law forts are alleged for willful behavior, such conduct is outside the scope of employment. See *California Civil Code* §§ 2339, 343(3); *DeMirjian vs. Ideal Heating Corp.*, 112 Cal.App.2d 251, 54 (1952) and *Ross vs. Goins*, 51 Cal.App. 412, 415 (1921). This being the case and the complaint alleging willful misconduct, substitution should not be permitted to the extent of such allegations.

Nevertheless, were this Court inclined to direct the lower court to consider substitution, it should provide the Court below with guidance as to which claims and remedies substitution is permitted and permit the Court to determine whether the factual basis for substitution exists. Pelletier submits that this is a question which most appropriately is addressed to the Court following the trial on the merits after the factual underpinnings of the

action have been determined. Behrens suffers no prejudice from this delay because he must still individually defend against the Bivens and Administrative Procedure Act claims.

CONCLUSION

Pelletier submits that this interlocutory appeal is a complete waste of this Court's time, at this juncture. The orders of the Court below are clear. The motions were at a minimum premature in the absence of discovery. Accordingly Pelletier requests that the orders be affirmed or in the alternative the appeal dismissed and Pelletier awarded his costs and fees in the sum of $10,000.

STATEMENT OF RELATED CASES

Pelletier is not aware of any related cases pending in this Court.

Dated: April 12, 1990

Respectfully submitted,

LAW OFFICES OF
SAMUEL T. REES

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for
Plaintiff-Appellee
Robert J. Pelletier

[Proof Of Service Omitted In Printing]

DEFENDANT/APPELLANT'S REPLY BRIEF, EOD MAY 1, 1990

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA

REPLY BRIEF FOR FEDERAL DEFENDANT BEHRENS

STUART M. GERSON
Assistant Attorney General

ROBERT L. BROSIO
United States Attorney

BARBARA L. HERWIG
(202)/FTS 633-5425
RICHARD A. OLDERMAN
(202)/FTS 633-3542
Attorneys, Appellate Staff
Civil Division, Room 3631
Department of Justice
Washington, D.C. 20530-0001

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IN THE UNITED STATES COURT OF APPEALS
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No. 89-56265

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

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Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR FEDERAL DEFENDANT BEHRENS

Rhetoric, like a galloping horse, has gotten out of control in plaintiff's brief. We attempt here to clarify what the case is about, why the appellant should prevail on the issues presented, and to correct plaintiff's misstatements.

I.

THIS COURT HAS JURISDICTION TO HEAR ALL THREE ISSUES RAISED BY THE APPELLANT

A. Plaintiff admits that "the issue properly before the Court is the issue of qualified immunity" (Brief at 2), but urges that this Court has no jurisdiction over the other two issues raised by this appeal – whether the plaintiff's *Bivens* action is barred by special factors, and whether the lower court erred by not substituting the United States for defendant Behrens on the common law tort claims, a procedure mandated by the recently enacted Westfall Act.[1] These assertions are not supported by any cogent and persuasive recitation of law, and are meritless.

This Court has in the past found jurisdiction in a qualified immunity appeal to rule on the "special factors" issue. In *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990), decided a short three months ago, the Court ruled on the special factors issue even though the interlocutory appeal was based on a denial of qualified immunity. The Court's action reflected sound jurisprudence. The issue at the heart of the special factors analysis is whether the plaintiff has any *Bivens* remedy whatsoever. Should this question be decided in the negative, there is no need to reach the qualified immunity issue. The two issues are obviously inextricably bound. Moreover, it simply makes no sense to rule on immunity only, leaving for a later day (in

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[1] As in our opening brief, we refer to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, codified at 28 U.S.C. 2679, as the Westfall Act.

the event immunity is denied) the threshold question whether the plaintiff was empowered to come into court in the first place urging a *Bivens* violation.

Therefore, in unabashedly stating to this Court that there is no jurisdiction to hear the special factors argument, the plaintiff has failed to read the decisions of this Court, which reflect jurisprudentially sound reasons for hearing the special factors issue in an immunity appea1.[2]

B. There appears to be nothing but rhetoric supporting plaintiff's second attack on jurisdiction, *i.e.* his suggestion that the Court lacks jurisdiction to hear the Westfall issue. In response to our argument that the denial of substitution under Westfall is tantamount to a denial of absolute immunity, plaintiff has only this to say: "It is not." (Brief at 12). Surely three small words of denial, without citation or argument, can hardly be enough to defeat the plain meaning of an act of Congress. That act, as we explained in our opening brief, has its provenance in the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Prior to the *Westfall* decision, it was widely understood that federal employees enjoyed absolute immunity from common law tort claims as long

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[2] Other courts, in immunity appeals, have considered issues procedurally similar to the special factors question raised here. For example, in *Carlson v. Conklin*, 813 F.2d 769 (6th Cir, 1987), the Sixth Circuit held that in an interlocutory appeal from a denial of qualified immunity it could reach the issue precedent to immunity – *i.e.*, whether the plaintiff had stated an actionable claim under 42 U.S.C. 1983. As the Court observed, "[i]f the plaintiff here has failed to state a Section 1983 claim, [the] qualified immunity defense becomes moot." 813 F.2d at 771. The Sixth Circuit's reasoning applies here.

as they were acting within the scope of their employment. See, *e.g., Barr v. Matteo,* 360 U.S. 564 (1959) (plurality opinion). Denials of absolute immunity were immediately appealable. See, *e.g., Nixon v. Fitzgerald,* 457 U.S. 731 (1982); *Marx v. Government of Guam,* 866 F.2d 294, 296 (9th Cir. 1989).

In *Westfall,* the Supreme Court held for the first time that absolute immunity was not available "unless the challenged conduct is within the outer perimeter of an official's duties *and* is discretionary in nature." 484 U.S. at 297-98 (emphasis in original). Congress's response was the Westfall statute which by *mandating* that there be substitution of the United States for individual defendants sued for torts committed while they acted within the scope of employment, was intended to restore an absolute immunity to these individuals. That Congress intended to give back to federal employees their absolute immunity from suit is clear – Congress specifically stated that its purpose in enacting the Westfall exclusive-remedy scheme was to render federal employees "immune from personal liability" for actions within the scope of their employment, *thereby "return[ing] [them] to the status they held prior to the Westfall decision."* 1988 USCCAN at 5947 (emphasis added). It is evident, therefore, that the defendant in this case was intended by Congress to be restored to his pre-Westfall status, *i.e.* it was intended that he be given absolute immunity. The mechanism for this is substitution – having the ultimate issues of tort law decided in a suit against the United States. Denying substitution of the United States denies the individual defendant absolute immunity. And that denial is immediately appealable.

Plaintiff has made no argument, and cited no law, to contradict this obvious fact. Moreover, although we demonstrated in our opening brief how this issue fits within the parameters of the *Cohen* collateral order doctrine[3] (opening Brief at 18-20), plaintiff has ignored this showing. We reiterate here that the lower court conclusively resolved an important issue separate from the merits (the substitution issue); and that any proceeding against Behrens on the common law tort counts will make the issue we wish to raise before this Court – whether substitution of the United States was mandatory – unreviewable. (It should be evident to even the plaintiff that by the time the case reaches this Court after final judgment Behrens will have already been subject to the burdens of discovery and trial, the burdens that an immediate appeal of immunity decisions under the *Cohen* doctrine was intended to avoid). Thus, the *Cohen* criteria have been met here, and the substitution issue is properly presented to this Court for review.

II.

THE PLAINTIFF'S MISSTATEMENTS SHOULD NOT BLIND THE COURT TO THE TRUE NATURE OF THIS CASE

A. Plaintiff contends that appellant Behrens "is neither a federal officer or even a federal employee" (Brief at 4); that he wrongfully ordered Pelletier dismissed from

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[3] See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Riverhead Savings v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990).

his job; that he acted outside the scope of his authority; and that he violated clearly established law, thus depriving him of the immunity defense. The picture plaintiff paints is not a pretty one; on the other hand, it is not an accurate one either.

To set the record straight: this case involves a defendant who was a federal employee by virtue of federal regulations and by official appointment by the Federal Home Loan Bank Board. In a letter to the plaintiff's employer, the defendant, acting in his official capacity as Supervisory Agent, stated that the Bank Board at that time could not approve plaintiff as the bank's president, because of an ongoing investigation of plaintiff's past activities. The defendant did not require that the plaintiff be fired, or that he not be employed by the bank in any top level position. Rather, the defendant wrote that "this office is unable at this time to proceed with the application until that inquiry is complete." (R.E. 28). The bank itself, which could have waited for the investigation to close, or could have hired plaintiff for a different position, chose not to wait. It was the bank (Pioneer) *not the Board or the defendant* that fired plaintiff Pelletier. With this background in mind, we turn to the erroneous statements and legal arguments of the plaintiff.

B.1. Federal Employee Status of Behrens

Plaintiff unequivocally states that Behrens was not a federal employee. This is difficult to reconcile with plaintiff's concession that "Behrens was appointed an agent of the FHLBB and FSLIC," (Brief at 6). As an agent of these two federal agencies, Behrens *was* a federal employee.

Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added). Moreover, the Federal Tort Claims Act, the statute under which the common law tort claims against the defendant would proceed if the United States is substituted as defendant, provides that an "employee of the government" includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. The definition clearly covers Behrens. While in some cases this Court has refused to accord private parties a qualified immunity defense,[4] no private party is involved here, for Behrens was incontestably an employee of the Bank Board. Although plaintiff challenges this conclusion, he never once refers to Bank Board Resolution No. 84-126, (R.E. 19) by which Behrens was appointed Supervisory Agent of the Board, or to cases supporting our construction of the regulations. See, *e.g., Saratoga Savings & Loan v. Federal Home Loan Bank*, 724 F.Supp. 683, 687 (N.D. Cal. 1989). In sum, the plaintiff has made bold but insupportable assertions and his arguments cannot be credited.[5]

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[4] See, *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989), discussed *infra* at pages 18-19.

[5] Plaintiff has asserted, without any citation, that "Behrens admits by his brief that he is neither a federal officer or even a federal employee," (Plaintiff's Brief at 4). The defendant made no such "admission." The defendant in his opening brief simply recited the factual history of his employment – that before his

2. The Action Declining To Approve Pelletier

Plaintiff claims that Behrens "caused Pelletier to be summarily fired from his position as the managing officer of a savings and loan association, and thereafter to be blackballed from further employment in the industry." (Brief at 3). This is another misstatement of fact. As we have just observed, Behrens did not mandate or coerce the firing of Pelletier. Pelletier was fired by, and in the sole discretion of, his employer Pioneer. Behrens prudently observed that the Board could not give its approval while Pelletier was under investigation for wrongdoing by the FSLIC ("We wish to advise you that an inquiry is currently being conducted by the * * * FSLIC * * * into the failure of the Beverly Hills Savings and Loan Association and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed * * *).[6] Pioneer was free to contest this withholding of approval; or to appoint Pelletier to another position; or to ask the Board for reconsideration. However, Pioneer declined to take any of these actions. It chose instead to fire Pelletier. The firing

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appointment by the Board he was an employee of the Federal Home Loan Bank of San Francisco, a quasi-governmental entity; that the Board appointed him as its Supervisory Agent; and that although he continued to be paid by the Federal Home Loan Bank Board of San Francisco, he was by law a federal employee carrying out federal functions. See, 12 C.F.R. 501.10. (See, Defendant's opening brief, at 10; 22-24).

[6] That this was prudent action is not only confirmed by common sense but by subsequent events. Pelletier was named as a defendant in a lawsuit brought by the FSLIC and charging, *inter alia*, breach of fiduciary duties and negligence. (R.E. 28)

was obviously Pioneer's doing, and cannot be attributed to Behrens. Thus, plaintiff's statement that "Behrens * * * destroyed Pelletier's career" (Brief at 3) is only hyperbole, and is not supported by the evidence.

3. Questions of Statutory Authority

a. Plaintiff states that "[a]lthough there was no statutory authority for doing so, the FSLIC purported to require that Pioneer secure approval of any new managing officer by the Principal Supervisory Agent * * * for a period of three years." (Brief at 6). Thus, plaintiff suggests that neither the FSLIC nor the Bank Board had authority to approve or disapprove Pelletier. And he goes on to urge that, in any event, it was the Principal Supervisory Agent who should have made the decision on Pelletier, not Supervisory Agent Behrens.

Plaintiff is simply wrong. As plaintiff should be aware, when new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Acting on behalf of the FSLIC, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.* This duty continues, even after a bank has been chartered.[7]

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[7] As already noted, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is

The FSLIC must not only closely scrutinize the new entity applying for insurance, but may in its discretion condition approval of insurance on continuing approval, for a period of years, of the applicant bank's policies and appointments. See n. 7, *infra*. Such was the case here. Pioneer's predecessor in interest, South Coast Savings & Loan Association, had received Board approval for insurance of its accounts. However, one of the conditions of this approval, as specified by Bank Board Resolution 84-164, was that the institution –

> shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent * * * . In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following, * * * the continuation or succession of competent management will also be subject to the

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impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.* This obligation to oversee savings and loans continues even after a bank charter is approved:

> After issuance by the Board of a charter for a Federal savings and loan association, said agent shall follow up the corporate actions taken by the association in the completion of its organization, and require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. [12 C.F.R. 501.11(e).]

Principal Supervisory Agent's approval. [R.E. 27]

Plaintiff fails to even acknowledge Bank Board Resolution 84-164. Indeed, he never once cites the Resolution in his brief. Yet the document is crucial to an understanding of both the history of the case, and the nature of the Bank Board's oversight of Pioneer.

It is obvious that Pioneer was required by this Resolution to obtain approval of its new president-designate. Pioneer, indeed, recognized this obligation: why else would it have submitted Pelletier's name to the agency for approval. Therefore, the plaintiff is dead wrong in asserting that there was no authority for requiring Pioneer to submit the names of its officers for Board approval.[8]

b. Similarly, there is no merit to plaintiff's contention that, if approval from the agency was necessary, the approval or disapproval should have come from Principal Supervisory Agent James Cirona, not by Supervisory Agent Behrens. (Brief at 7-8). Behrens had the delegated authority of the Principal Supervisory Agent, and his

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[8] Section 914 of the new FIRREA statute expressly requires agency approval of directors and senior executive officers. Under this statutory provision, "[a]n insured depository institution or * * * holding company may not add any individual to the board of directors or employ any individual as a senior executive officer if the appropriate Federal banking agency issues a notice of disapproval * * * ." This applies to institutions chartered less than two years; institutions that have undergone changes in control within the preceding two years; and institutions not in compliance with certain minimum capital requirements. See, 12 U.S.C. 1831i.

consideration of the Pelletier appointment was thus entirely lawful and proper. See, 12 U.S.C. 1437(a) ("the Board may from time to time make such provision as it deems appropriate authorizing the performance by any officer, employee, agent, or administrative unit thereof of any function of the Board * * * * "); 12 C.F.R. 501.10; 501.11(d). See also, *Saratoga Savings & Loan, supra,* 724 F. Supp. at 684-5.

c. Finally, we note that there is also no merit to plaintiff's assertion that if Pelletier was to be "removed," the action should have been taken pursuant to statute. To support this argument plaintiff cites to 12 U.S.C. 1730(g) and(h), statutory provisions which govern removal of previously approved officers. This case, however, does not concern removal of a *previously approved* officer. This is a case about *approval* of an officer. No one disputes that, had Pelletier been approved, any subsequent removal from what would have then been a permanent position with vested rights would trigger the statutory remedies plaintiff refers to. This case only involves the threshold step of approval; therefore, Behrens acted lawfully, and with full authority. The plaintiff errs in asserting otherwise.

III

BEHRENS IS ENTITLED TO QUALIFIED IMMUNITY

A. It is the plaintiff's burden to demonstrate to the Court that the rights allegedly violated were clearly established. See, *Baker v. Racansky,* 887 F.2d 183 (9th Cir. 1989). Given this burden, we find it remarkable that plaintiff has not addressed the most relevant federal

court of appeals decision dealing with the immunity issue, the Fifth Circuit's decision in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989). In *Connelly*, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established property right in employment where the employment was "contingent upon regulatory approval." Accord: *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 479 U.S. 885 (1986). Since Pelletier had at best a unilateral expectation of employment, and the case law supports the view that in such circumstances no due process property rights are violated when contingent approval is not forthcoming, Behrens – given the facts known to him which he believed to be true – acted reasonably and is thus entitled to immunity.[9]

B. Plaintiff claims that "the Behrens Directive is so flatly contrary to long-established law that no immunity can protect him." (Brief at 16). Plaintiff then goes off on a

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[9] None of the cases cited by the plaintiff, some of them quite ancient, support his assertion that due process was not accorded him. The only case he cites which is at all relevant, although not on point, is this Circuit's holding in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987). However, as we noted in our opening brief, the Court in *Mackey* found that the plaintiff had a legitimate claim to his job based on state law, and that the federal agency had actually ordered termination of plaintiff's employment. *Mackey*, therefore, is a much different case than this one, since here plaintiff had only a unilateral expectation of employment, and he was not ordered terminated by the Bank Board.

long excursion, explaining why Behrens could not "blackball" Pelletier, *i.e.* because under both federal and state law Pelletier had the right to pursue his employment free from unreasonable governmental interference.

The plaintiff fails, however, to squarely face the facts of this case. It is obvious from the Behrens letter that the defendant only declined to approve Pelletier as president "at this time." This is not the same thing as ordering the man fired. It was Pioneer that ordered Pelletier fired, choosing to do this rather than await the outcome of the FSLIC investigation; rather than appointing Pelletier to another position; and rather than challenging the Board decision. In sum, Behrens neither fired Pelletier, ordered him fired, or "blackballed" him. Therefore, none of Pelletier's citations, which deal with cases where a state agent ordered a termination of employment, (*e.g., Endler v. Schutzbank,* 68 Cal. 2d 162 (1968)) are relevant.

C. Plaintiff's other attacks on our immunity argument are equally insubstantial. First, he is "at a loss to determine how this Court can even go about the task of [deciding this issue] in the face of a total lack of record citations * * * ." (Brief at 11). Second, he contends that an interlocutory appeal of a denial of immunity can only be taken where the appeal is from a denial of summary judgment, not where the appeal lies from the denial of a motion to dismiss. Third, he asserts that the Court cannot reach the issue because "the Court below did not decide the issue of qualified immunity *as a matter of law* in ruling on the motion for summary judgment" (Brief at 11). And fourth, he urges that Behrens was not a federal employee but a private person, who cannot claim immunity. Our answers to these claims are as follows.

1. Proper citations.

The opening brief of the defendant contains the required citations to the record. These appear in both the factual statement and the argument. They include references to where in the record the district court addressed the issues raised. (See, *e.g.* Defendant's Opening Brief at 10-14, particularly at 13 ("The District Court Orders")). Even without such citations, the Court would not be "at a loss" to decide the immunity issue since the issue is reviewed *de novo* and the key documents (*i.e.* the district court orders, the Resolution appointing Behrens, the Resolution requiring continuing approval of Pioneer's officers, and the letter Behrens wrote to Pioneer) are all contained in the Excerpts of Record. It is evident from these documents that Behrens acted within the scope of his employment and could not have reasonably believed he was violating clearly established law.[10]

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[10] The theme of failing to properly cite to the record runs throughout plaintiff's brief. The fact is that the defendant's opening brief contains numerous citations to the record, as required by the Court's rules. Pages 12-15 of our opening brief explains the nature of the present litigation and the nature of the district court orders, and properly cites to the record. Contrary to plaintiff's urging, therefore, the Court should not "be at a loss to determine" what the lower court did and what issues are presented on appeal.

This makes it even more preposterous that plaintiff has asked that the Court subject defendant to "sanctions" for failure to include citations to the record. (Brief at 1).

2. Appealability

a. Plaintiff's contention that only denials of summary judgment on immunity grounds are appealable (hence not denials of motions to dismiss based on immunity) is nonsense. The Supreme Court has held that qualified immunity questions should be resolved at the earliest possible stage of litigation. See *Anderson v. Creighton*, 483 U.S. 635; *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Courts following this instruction regularly take appeals from denials of qualified immunity defenses raised in motions to dismiss. See, *e.g.*, *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) (denial of motion to dismiss based on immunity falls within the Cohen collateral order doctrine); *Neu v. Corcoran*, 869 F.2d 662 (2d Cir. 1989); *Clark v. Evans*, 840 F.2d 876 (11th Cir. 1988); *Carlson v. Conklin*, 813 F.2d 769 (6th Cir. 1987).

It is particularly important in cases like this one to hear appeals from denials of immunity as soon as possible. The *Bivens* cause of action is often abused by litigants who quarrel with governmental action. Plaintiffs often sue the federal official in his official capacity and his personal capacity, even where, as here, it is clear that the official was simply performing his lawful duties. Since no employee in the private sector has the potential liability of a federal employee, the qualified immunity defense was intended to be proffered as early as possible in the litigation and, if rejected, to be appealed immediately. This means an appeal from a denial of a motion to dismiss is as valid as an appeal from a denial of summary judgment.

b. Plaintiff's additional claim that the court below did not reject qualified immunity as a matter of law, and that therefore the issue may not be appealed, is also fallacious. The court below squarely denied the defendant's legal claim to qualified immunity. The immunity argument was made in full in Defendant's Motion to Dismiss, dated May 16, 1989, at pages 2326. The district court granted the motion to dismiss in part, and denied it in part, stating as follows:

> The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent such claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment * * * . [R.E. 32-33].

The court plainly refused to dismiss Behrens from this lawsuit on immunity grounds. This judgment is reviewable in this Court on appeal.

We note that appeal of the immunity issue is particularly important here for several reasons: First, the case's procedural history reveals that the district court denied the immunity claim *without explanation*, and ruled *without holding a hearing on the issues presented*. The court's failure to explain its actions is particularly troubling; the court had already ruled that because of the one year California statute of limitations applicable to *Bivens* claims, the plaintiff's *Bivens* cause of action, to which defendant had proffered his immunity defense, could *not* be based upon

either the Behrens letter to Pioneer, or the subsequent firing of Pelletier by Pioneer. Since in the lower court's view the two actions upon which plaintiff based his claim for relief could not be the basis of a *Bivens* lawsuit, and since no other specific allegations of wrongdoing have been alleged, the district court's denial of the immunity defense makes little sense. It would undermine the purposes of the immunity doctrine if this decision – made without explanation or a hearing – could not be reviewed quickly by an interlocutory appeal.

3. Status as a Federal Employee

Plaintiff's contention that Behrens was not a federal employee but a private person, and thus not entitled to immunity, has already been addressed in our opening brief at pages 22-24; 42-44, and in this brief, *supra*, at pages 6-7. This is not a case like *F.E. Trotter, Inc.* in which this Court refused to accord private parties a qualified immunity defense. *Trotter* involved a private engineering firm's study of the lands surrounding a naval air station in Hawaii. The landowners claimed that the study and the actions it recommended "impacted and blighted" their property. 869 F.2d at 1313. Observing that the Supreme Court has not decided whether to accord private defendants immunity in 1983 and *Bivens* suits, the Court extended its earlier statement, in *Howerton v. Gabica*, 708 F.2d 380, 385 n. 10 (9th Cir. 1983), that private defendants in 1983 suits are not eligible for qualified immunity. Behrens, of course, was not a government contractor performing an assigned task, but a duly appointed Supervisory Agent of the Bank Board. As we have already

emphasized, he was carrying out federal functions pursuant to federal regulations and statutes. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He thus may claim, and in our view should be granted, qualified immunity from suit. See, *United States v. Hollingshead*, 672 F.2d 751, 754 (9th Cir. 1982) (employees of the Federal Reserve Banks are public officials for purposes of the federal bribery statutes; "the test for determining status as a public official turns on whether there is 'substantial federal involvement' in the defendant's activities.").[11]

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[11] Plaintiff asserts (Brief at 19) that Behrens violated his clearly established rights because under the Privacy Act the Board should have made an "adequate agency record"; and because provisions of the Home Owners Loan Act of 1933 were not followed.

However, the district court dismissed the Privacy Act claim as to Behrens (R.E. 33), and that dismissal is not before this Court. In any event, the Privacy Act, which requires federal agencies to permit individuals access to their records and to seek amendment of inaccurate records (5 U.S.C. 552a(d)) is not relevant here. Even if it were relevant, the act would not give plaintiff a private right to sue an individual official for violations of its provisions. See, *Hewitt v. Grabicki*, 794 F.2d 1373, 1377 & n.2 (9th Cir. 1986).

Reliance on the Home Owners Loan Act is also misplaced. 12 U.S.C. 1464(d), upon which plaintiff relies, does not apply to this case. The section establishes a procedure by which the Bank Board may remove a director or officer of an "association." The definition of "association" excludes state-chartered institutions, like Pioneer. 12 U.S.C. 1462(d). Nothing in the statute, in any event, provides a private right of action for damages.

III.

THE UNITED STATES SHOULD HAVE BEEN SUBSTITUTED AS DEFENDANT ON THE COMMON LAW COUNTS

A. One of plaintiff's most difficult to digest claims is that the Court should not substitute the United States as defendant because the statute under which substitution of the United States would occur (the Westfall Act) "has not been discussed in published opinions." (Brief at 24). Not only has plaintiff missed the numerous published decisions construing this statute, he apparently has not read our brief, which cites them. (See Defendant's Opening Brief at 16, 29 n. 12). See, *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Sowell v. American Cyanamid Co.*, 888 F.2d 802 (11th Cir. 1989); *Saratoga Savings & Loan v. Federal Home Loan Bank, supra*, 724 F. Supp. at 684-5. See also, *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), petition for a writ of certiorari filed April 20, 1990 (Sup. Ct. No. 89-1646).

The fact is that substitution of the United States under the terms of the Westfall statute is regularly granted by the federal courts. It must occur whenever a federal employee is sued in his or her individual capacity for common law torts committed in the scope of employment.

B. We devoted pages 24-26 of our opening brief to establishing that Behrens was acting within the scope of his employment. Plaintiff has not addressed the cases we cited, (*e.g., In Re Complaint of McLinn*, 744 F.2d 677 (9th Cir. 1984)), but has cited two cases of his own, and a section of the California Civil Code, in support of the

proposition that "California law is clear that to the extent common law torts are alleged for willful behavior, such conduct is outside the scope of employment." (Brief at 25). Neither the two cases plaintiff cites nor the California Civil Code supports this statement. In *Demirjian v. Ideal Heating Corp.*, 112 Cal. App. 2d 251 (1952), the court simply held an employer is not responsible for an employee's acts "which have no connection with the duty of employment." 112 Cal. App. 2d at 254. In *Ross v. Goins*, 51 Cal App. 412 (1921), the court found that as a matter of proper pleading a complaint charging an employer with liability for an employee's assault must also aver that the principal authorized the act. The California Civil Code provides that an agent is acting within scope so long as the wrongful acts committed occur while transacting the master's business, or was incident to his duties as employee. See California Civil Code, Section 2338, and case annotations. Since Behrens, when disapproving plaintiff as bank president, was clearly transacting his master's business (*i.e.*, the business of the Bank Board), even plaintiff's citations support our assertion that Behrens was acting within the scope of his employment.

IV.

SPECIAL FACTORS PRECLUDE BIVENS RELIEF

The plaintiff states that special factors will preclude creation of a *Bivens* remedy only when "Congress has provided, in the legislative design, what Congress considers an adequate redial [sic] mechanism for Constitutional violations." (Brief at 23). This is an incorrect statement of the test. As this Court and the Supreme

Court have ruled, special factors will preclude creation of *Bivens* remedies when Congress has comprehensively constructed an elaborate remedial system with careful attention to conflicting policy considerations, and has not inadvertently failed to provide the relief the plaintiff seeks. See, *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988); *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), and *Le Bid v. Hanson*, *supra*.

In this case, Congress has comprehensively regulated the thrift industry, and has not inadvertently left out a remedy for money damages in favor of individuals not approved for positions by the Bank Board. When the FSLIC believes that an officer or director of an insured institution, someone already approved, appointed, and vested in his or her position, has evidenced personal dishonesty, violated any law, rule, regulation, or final cease-and desist order, participated in any unsafe or unsound banking practice, or breached his fiduciary duty to the institution, the FSLIC may order an immediate suspension of that person from office and institute proceedings to remove him permanently from the thrift industry. 12 U.S.C. § 1730(g)(1) and (2). In such circumstances, Congress has laid out a careful and comprehensive statutory scheme prescribing varying levels of review for each of the FSLIC actions just described. See, 12 U.S.C. § 1730(q)(4) and (5); *Id.* § 1730(g)(5).

However, in the instant case, the statutory provision that authorized defendant Behrens' actions is 12 U.S.C. § 1726(c), which governs *applications* for FSLIC insurance. While in Section 1726(c) Congress expressly directed the FSLIC to "reject the application of any applicant [for

FSLIC insurance] if it finds that * * * [the applicant's] financial policies or management are unsafe * * * [or] that the character of management of the applicant * * * is inconsistent with economical home financing or with the purposes of this subchapter," Congress did not provide to the individual affected any administrative or judicial review of the FSLIC's decisions under Section 1726(c). Congress' choice reflects a careful balancing of the interests of an affected individual against the need to protect the soundness of the thrift system. The Court, therefore, should hesitate to create a *Bivens* remedy in favor of the plaintiff.

This does not mean that the plaintiff would have been entirely without a remedy for any alleged constitutional violations. At least in the D.C. Circuit, he could have brought an action against the agency (or against Behrens in his *official* capacity) seeking equitable relief, even though *Bivens* relief is foreclosed by special factors. See, *Spagnola v. Mathis*, 859 F.2d 223, 229-230 (D.C. Cir. 1988) (*en banc*).[12]

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[12] Plaintiff's claim that he should be awarded attorney's fees for this appeal fails to note that, even assuming *arguendo* that such fees are available in a *Bivens* suit, no EAJA fees could be awarded in this case because the position of defendant Behrens is substantially justified. See 24 U.S.C. 2412(d).

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

Respectfully Submitted,

STUART M. GERSON
Assistant Attorney General

ROBERT L. BROSIO
United States Attorney

BARBARA L. HERWIG
(202)/FTS 633-5425
RICHARD A. OLDERMAN
(202)/FTS 633-3542
Attorneys, Appellate Staff
Civil Division, Room 3631
Department of Justice
Washington, D.C. 20530-0001

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COURT OF APPEALS' ORDER REQUESTING SUPPLEMENTAL BRIEFS, EOD JANUARY 6, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 D.C. No. CV-89-0969-RMT ORDER (Filed Jan. 6, 1992)

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior U.S. District Court Judge*

Pursuant to our order of limited remand entered May 2, 1991, the district court has considered appellant Behrens' request for substitution of the United States as defendant, in his place, under the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), and has issued a ruling denying that request. Accordingly, we now reinstate Behrens' appeal.

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* Senior United States District Judge, District of Hawaii, sitting by designation.

The parties are hereby requested to brief the issues of whether denial of a motion to dismiss based on a qualified immunity claim is immediately appealable in this circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and whether denial of a request for substitution of the United States as a defendant under the FELRTCA is likewise immediately appealable. The government shall have 21 days from the date of this order in which to file its opening brief. Appellee Pelletier shall file his response within 14 days thereafter, with the government's reply brief, if any, to be filed within 10 days of the response. The opening briefs shall not exceed 20 pages and the reply shall not exceed 10 pages.

DEFENDANT/APPELLANT'S MOTION TO STAY, EOD JANUARY 24, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER Plaintiff-Appellee v. FEDERAL HOME LOAN BANK BOARD Defendants, and JOHN W. BEHRENS Defendant-Appellant.	)	No. 89-56265

MOTION OF THE APPELLANT FOR A STAY OF DISTRICT COURT TRIAL PROCEEDINGS UNTIL THIS COURT ISSUES A RULING ON THE IMMUNITY ISSUES IN THIS APPEAL

Pursuant to Rules 8 and 27, Federal Rules of Appellate Procedure, and Rule 27 of this Court, the appellant, John W. Behrens, by his counsel at the Department of Justice, respectfully requests a stay of all trial proceedings in the district court pending this Court's resolution of this appeal. A stay pending appeal was sought from the district court on November 10, 1991. The stay was denied on January 17, 1992.[1]

[1] All relevant orders are attached to this motion.

This case has already been briefed and argued before a panel of the Court. After issuing an order requiring a limited remand, the appeal was reinstated by order of the Ninth Circuit, dated January 6, 1992. The appeal raises two significant and dispositive legal issues: whether the defendant is entitled to qualified immunity from suit on the allegations of constitutional wrongs asserted against him; and whether he is entitled to the absolute immunity from suit provided by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Reform Act"). Under the Reform Act, a federal defendant sued for common law torts in his personal capacity is granted absolute immunity, by the mechanism of substitution of the United States as defendant. Substitution is required by the Reform Act when the individual defendant was acting within the scope of his employment.

Although this Court has time and again held that the purpose of deciding official immunity questions at the earliest possible time is *to avoid trial*, the district court has set a trial date of April 21, 1992 and a pre-trial date of March 2, 1992; to satisfy Local Rules No. 9, pre-trial meetings will commence on January 30, 1992. These imminent dates for pre-trial and trial erode the purposes of the immunity defense, and will irrevocably harm the defendant. This Court has held that "[t]he entitlement is an immunity from suit rather than a mere defense to liability; *it is effectively lost if a case is erroneously permitted to go to trial. Compania Mexicana De Aviacion v. U.S. District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). See, *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991).

Proceeding to trial, without awaiting the outcome of this appeal, will cause unnecessary work and confusion at the trial level. The district court ruled that for purposes of Reform Act substitution, the defendant was *not* acting within the scope of his employment at the time the acts complained of took place. However, if the lower court is correct on this point, then by setting for trial plaintiff's Federal Tort Claims Act, APA, Privacy Act, and common law tort claims against the United States the court has erred; for these claims against the United States logically fail if the defendant was not acting within the scope of his employment. Plainly, the United States cannot be liable for damages if its employee was acting outside the scope of his employment when committing the acts charged as wrongful. Much of the case, in other words, now turns on a review of the district court's ruling on the Reform Act substitution issue, an issue squarely presented in the appeal before this Court.

In sum, logic, as well as the law of official immunity, counsels strongly against proceeding with a trial at this juncture. There is no harm to the plaintiff in waiting; on the other hand, if a trial takes place the defendant loses his right not to stand trial until the immunity issue has been resolved, a right that cannot be restored to him after trial.

STATEMENT

A. Factual Background

1. The defendant, John W. Behrens was, at the time of the events giving rise to this lawsuit, an employee of the Federal Home Loan Bank of San Francisco, a privately

owned institution. On March 17, 1984, the Federal Home Loan Bank Board (now part of the Office of Thrift Supervision) adopted Formal Resolution 84-126, designating Behrens a Supervisory Agent, hence an agent of the Board and of the FSLIC. Behrens continued to be paid by the Federal Home Loan Bank of San Francisco, but instantly became responsible for supervising federally insured savings and loan institutions in the San Francisco district to insure compliance with law.

2. The plaintiff, Robert J. Pelletier, was the president designate of Pioneer Savings & Loan Association. Because Pioneer was a so-called "de novo" savings and loan (an institution in operation less than three years at the time it applied for FSLIC insurance, see 12 C.F.R. 571.6(b)), Pioneer was required to obtain approval of its new president-designate from Supervisory Agent Behrens.

This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan officer and head of the bank's Major Loan Division, turned up wrongdoing at that bank, problems so serious that Agent Behrens on behalf of the Bank Board sent a letter to Pioneer advising that because of the ongoing FSLIC investigation, "this office is unable at this time to proceed with the application [seeking approval of Pelletier as president]." Further, Behrens advised, "we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Saving is complete." The letter

was on Board stationery and signed by Behrens as "Supervisory Agent" of Pioneer.

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by Pioneer.

B. The Initial District Court Proceedings

This lawsuit was brought by Pelletier to avenge his dismissal by Pioneer. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Behrens. Counts one and two of the complaint sought damages and equitable relief based upon an alleged deprivation of Pelletier's procedural and substantive due process rights. Other counts were founded upon the APA, the Privacy Act and common law tort theories, the latter including interference with contract rights, intentional infliction of emotional distress and negligence.

The Department of Justice filed a motion seeking substitution of the United States for Behrens, insofar as common law torts were alleged, a requirement of the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988; seeking the dismissal of all other claims; and seeking a grant of qualified immunity for Behrens.

The district court granted the motion in part. The court dismissed the APA and Privacy Act damage claims against Behrens, and held that the one year state statute of limitations on *Bivens* claims barred a *Bivens* claim based on the Behrens letter to Pioneer or the act of

dismissal itself. The court also held that California's one year statute of limitations barred certain acts alleged to be common law torts. However, the court made the following additional rulings:

1. The court declined to dismiss the *Bivens* claim, to the extent it rested on acts that were not time-barred – even though no specific acts were alleged;

2. The court appeared to deny substitution of the United States as defendant on the remaining common law tort counts;

3. The court denied Behrens' motion for summary judgment on qualified immunity grounds, stating that granting the motion would be premature;

4. The court vacated an earlier protective order, reasoning that whether Behrens acted outside the scope of his authority could be known only after discovery was complete.

C. The First Appeal To the Ninth Circuit

1. Behrens appealed three issues to this Court: (1) whether, to the extent the complaint alleged the commission of common law torts, the district court erred by failing to substitute the United States for the individual defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988; (2) whether the special factor of Congress' comprehensive regulation of the thrift industry barred plaintiff's *Bivens* action; (3) whether Behren's motion for qualified immunity should have been granted by the district court. Behrens sought a stay of discovery pending appeal. However, the stay

pending appeal was summarily denied by the Court, without comment.

2. The appeal was duly briefed and it was argued before a panel of the Court on April 4, 1991. During the course of the oral argument, the panel indicated that it was unclear whether the district court had formally ruled on the Reform Act substitution issue.

On May 2, 1991, the Court remanded the case to the United States District Court for the Central District of California "for the limited purpose of enabling the district court to advise us if a ruling [on the substitution issue] has been made, and if so, the nature of its ruling." If no ruling had been made, the district court was instructed to rule on the issue.

On July 24, 1991, the Ninth Circuit ordered that submission of the appeal be vacated "pending order of the Court."

D. Subsequent Actions By The District Court

On July 29, 1991, the district court entered an order stating that it had not ruled on the substitution issue, and requiring further briefing of that issue.

Thereafter, on October 8, 1991, the district court issued a second order, one that addressed the substitution issue, *i.e.*, the subject of the Ninth Circuit's limited remand. The lower court held that the federal defendant was not acting with the scope of his employment at the time the alleged acts occurred, and that therefore, there could be no substitution of the United States as defendant under the Reform Act.

The district court has set a trial date of April 21, 1992 for plaintiff's FTCA, APA, Privacy Act, and other claims against the United States and its agencies (*i.e.*, the Office of Thrift Supervision and the Federal Deposit Insurance Corporation which was joined as a defendant); also scheduled for trial on this date are the *Bivens* and common law tort claims lodged against Behrens. Pre-trial is set for March 2, 1992. To satisfy local rules, pretrial meetings will commence on January 30, 1992.

On November 10, 1991, the Justice Department filed a motion in district court to stay all trial proceedings pending ultimate disposition of the case by the Ninth Circuit. The motion for a stay was denied by the district court on January 17, 1992.

E. Recent Actions In the Ninth Circuit

On November 1, 1991, after the lower court's ruling on substitution, the Justice Department filed a motion with the Ninth Circuit seeking to have the appeal reinstated, and seeking permission to file supplemental briefs on the scope of employment issue – or any other issue the court was interested in.

Thereafter, on January 6, 1992, the Ninth Circuit issued an order reinstating the appeal. The court also ordered the filing of supplemental' briefs on two issues: whether denial of a motion to dismiss based on qualified immunity "is immediately appealable in this circuit" and whether denial of a motion to substitute is immediately appealable. We are at present preparing our supplemental brief.

ARGUMENT

This case easily satisfies the requirements for a stay of all trial proceedings – a showing of irreparable harm absent a stay; a likelihood of success on the merits; and lack of any harm to the non-moving party by issuance of a stay.[2] A stay pending resolution of this appeal would be to the benefit of all parties, for this Court's ruling on appeal will necessarily clarify the causes of action that plaintiff may have, and the parties against whom those causes of action may be asserted. At the same time, a stay will prevent the defendant from forfeiting his right not to stand trial until the immunity issue has been decided – a right recognized by this Court as well as the Supreme Court of the United States as one that is lost – to the irreparable harm of the defendant – if the case proceeds to trial before the immunity issues are resolved. We address the elements for a stay below.

A. Irreparable Harm

1. The law of official immunity law is well-established. A federal defendant is entitled to have his or her claim of immunity decided at the earliest possible time prior to trial, and if the claim is denied, the defendant is entitled to take an interlocutory appeal to a federal appellate court on the issue. Such early adjudication of immunity claims is permitted because "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long

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[2] See, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Briggs v. Sullivan*, 886 F.2d 1132 (9th Cir. 1989).

drawn out lawsuit," *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). The immunity defense is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question [of immunity]." *Mitchell v. Forsyth*, 472 U.S. at 526.

This Court has repeatedly recognized that immunity issues are to be decided before final judgment, so that the defendant does not have "to answer for his or her conduct in a civil damages action. See, *Di Martini v. Ferrin*, 889 F.2d 922, 925 (9th Cir. 1989), *amended*, 906 F.2d 465 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2796 (1991) ("[d]enying the official interlocutory review denies him or her the right to avoid trial." Moreover, the Court has recognized that if a defendant is forced to go to trial before the immunity issue is resolved, he or she suffers irreparable harm. Thus the Court in *Compania Mexicana De Aviacion v. U.S. District Court*, held that "[t]he entitlement is an immunity from suit rather than a mere defense to liability; *it is effectively lost if a case is erroneously permitted to go to trial*". 859 F.2d at 1358 (emphasis added).

2. At issue here, then, is an entitlement not to stand trial, one that will be lost if trial is allowed to proceed. Permitting the trial to go ahead, as planned, on April 21, 1992, and indeed permitting the pre-trial to commence (pre-trial that necessarily entangles the defendant in the burdens of trial)[3] inflicts an irreparable injury on the

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[3] In *Siegert v. Gilley*, 111 S.Ct. 1789 (1991) the Supreme Court observed that "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant * * * unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."

defendant, and violates the law of this Circuit and the Supreme Court.

To avoid irreparable harm to a defendant appealing the denial of official immunity, several courts have held that filing a notice of appeal from the denial of a pre-trial motion based on official immunity divests the lower of court of jurisdiction to go to trial. The United States Court of Appeals for the Seventh Circuit held in *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) that –

> The justification for the interlocutory appeal is that the trial destroys rights created by immunity * * * . It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one * * * . [A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial. [870 F.2d at 1338]

The United States Court of Appeals for the Tenth Circuit issued a similar ruling in *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990):

> In contrast to some interlocutory appeals under 28 U.S.C. 1292(b) that challenge discrete orders that can be carved out and isolated from the remainder of the case, a motion to dismiss the entire proceeding based on a defense of double jeopardy or qualified immunity cannot be so isolated. If the defense is valid, then no part of the action should proceed against the defendant. [In such circumstance, a notice of appeal] divests the district court of jurisdiction to proceed with any part of the action

> against an appealing defendant. [915 F.2d at 576]

This Court, we submit, should grant a stay of trial proceedings for the very reasons that motivated the Tenth and Seventh Circuits to issue the decisions in *Apostol* and *Donges*: permitting a trial to proceed while the immunity issues remain on appeal simply makes no sense and works too great a harm on the defendant who has gone to the court of appeals with his good faith claim of immunity. As the Seventh Circuit observed in *Apostol* "[i]t makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one * * * . See, 870 F.2d at 1338.

3. Moreover, in this case there are additional reasons for granting a stay. Allowing a trial to proceed, after the district court's ruling that the defendant was acting outside the scope of his employment, will almost certainly confound the trial proceedings, making them more rather than less complicated. The district court has ruled that for purposes of Reform Act substitution, the defendant was *not* acting within the scope of his employment at the time the acts complained of took place. However, if the lower court is correct on this point, then it has erred by setting for trial plaintiff's Federal Tort Claims Act, APA, Privacy Act, and common law tort claims against the United States. These claims against the sovereign logically fail if the defendant was not acting within the scope of his employment, for the United States cannot be liable for damages if its's employee was acting outside the scope of his employment when committing the acts charged as wrongful. Much of the case, in other words, presently turns on a review of the district court's ruling on the Reform Act substitution issue, an issue squarely presented in the

appeal before this Court. An orderly process of adjudication suggests that the dispositive issues be handled on appeal before the trial proceeds go forward.

A stay, therefore, will clarify the issues to be resolved at trial and the parties against whom various causes of action may be asserted.

B. Likelihood of success on the Merits

1. The defendants have a strong likelihood of success on the merits of their appeal.[4]

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[4] As a threshold matter, it is clear that the lower court orders on qualified immunity and Reform Act substitution are appealable. This Court has often held that appeals of immunity issues may be maintained from a lower court's denial of immunity at the motion to dismiss stage. See, *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991); *Compania Mexicana De Aviacion v. U.S. District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988). The Supreme Court has authorized interlocutory appeals from denials of both absolute and qualified immunity, see *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In addition, the Supreme Court has held that denials of substitution under the Reform Act are denials of absolute immunity: "[t]he Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in Westfall." *United States v. Smith*, 111 S.Ct. 1180, 1183 (1991). See, also, *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (where district court remand order effectively denies employee Reform Act immunity, the order is appealable); *Nasuti v. Scannell*, 906 F.2d 802 (11th Cir. 1990) (district court order declining to rule on scope and remanding to state court is appealable); *Yalkut v. Gemignani*, 873 F.2d 31 (2d Cir. 1989) (denial of substitution is an appealable order).

The act upon which the legal theories of plaintiff's complaint principally rest – Behrens' letter declining to approve or disapprove Pelletier as president until the FSLIC investigation was concluded – was found by the district court to be time-barred. This leaves only generalized complaints that Behrens and the other defendants somehow "conspired" to deny Pelletier employment in the financial industry. However, as this Court has repeatedly held, a plaintiff is not entitled to survive "on vague assumptions [about the loss of employment opportunities]" not supported by specific allegations in his complaint. *Di Martini v. Ferrin*, 889 F.2d at 926-27. See also, *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Clearly, plaintiff should not be able to preclude a ruling on immunity, or on the common law tort issues, by relying on liberal notions of pleading; the defendant has given a detailed explanation of his actions and plaintiff cannot simply rest upon the bare allegations of his complaint. See, *Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

2. Moreover, even if the specific allegations of the complaint were not time-barred, the district court should have granted Behrens immunity on the *Bivens* count, and should have substituted the United States on the common law tort counts.

(1). Qualified Immunity

The plaintiff's principal complaint is that because he was being investigated by the FSLIC for wrongdoing during his tenure at another bank, Behrens was "unable to proceed" with the application seeking approval of Pelletier as president of Pioneer. Pelletier attempts to

make out of this action by Behrens a constitutional violation. However, there was nothing remotely illegal about Behrens, action. Pelletier was the subject of an FSLIC investigation which found wrongdoing at the Beverly Hills Savings & Loan Association, where Pelletier had been a senior loan officer. Had Behrens, acting on behalf of the agency, not declined to approve or disapprove Pelletier, he might later have been charged with not carrying out the mandates of his office.[5] All Behrens did was to decline approval of Pelletier "at this time," and until "the investigation into the failure of Beverly Hills Saving is complete." It was, after all, Pelletier's employer, Pioneer, that made the decision to terminate him. The decision to terminate was *not* made by Behrens.

To deny immunity, the district court would have had to find that Behrens, in taking this action, reasonably should have known he was violating a clearly established right. As we have just observed, Behrens was only being true to the requirements of his job. He could not have reasonably believed he was violating clearly established law.

The Fifth Circuit's holding in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989), supports this conclusion. In a factual situation remarkably similar to

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[5] Indeed, the FSLIC subsequently sued Pelletier and other former officers and directors of Beverly Hills for alleged breach of fiduciary duty, negligence, waste and diversion of corporate assets. The defendants in that case, Pelletier included, have finalized a settlement agreement expected to result in the payment to FSLIC of more than $8 million.

the one here, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established right to property or liberty interest in being a president designate, for the position was contingent upon regulatory approval. 876 F.2d at 1213, 1214. See also, *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 107 S. Ct. 276 (1986) (unsuccessful applicant for ALJ position had no property interest in the job).

Official immunity questions are to be decided on the basis of the nature of the functions performed by the defendant, not on the defendant, position in the government. *Harlow v. Fitzgerald*, 457 U.S. at 807, 811-12; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n. 30; *Butz v. Economou*, 438 U.S. 478, 511 (1978). Here defendant Behrens was actually an appointee of the Board and the FSLIC, and performing federal functions entrusted to him by statute and regulations. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He is thus, under decisional law such as *Connelly v. Comptroller of the Currency*, entitled to qualified immunity from suit.[6] See,

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[6] Nothing in *Meyer v. Fidelity Sav.*, 944 F.2d 562 (1991) is to the contrary. *Meyer* was a suit for damages brought by the executive vice-president of a California-based thrift institution, arising out of the termination of the vice-president's employment by Robert Pattullo, a special representative for the FSLIC. Although the *Bivens* claim was based on an assertion that Pattullo had wrongfully terminated the plaintiff from his position

Maraziti v. First Interstate Bank, No. 90-56001, (9th Cir., decided January 3, 1992) (the right the official is claimed to have violated must have been clearly established in a particularized sense before immunity can be defeated).

(2). Substitution of the United States

(a). Clearly, the United States should have been substituted for Behrens under the Federal Employees Liability Reform and Tort Compensation Act of 1988, and the suit permitted to proceed to judgment under the FTCA.

The Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation are federal agencies under the FTCA. See, 28 U.S.C. 2671 (federal agency includes independent establishments of the United States).

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as bank vice-president, this Court held that the facts alleged did not support a claim of violation of clearly established law. 944 F.2d at 576. In reaching this conclusion, the Court noted that "[r]ules governing federally insured institutions * * * make for treacherous law," 944 F.2d at 577, and that "in light of the complex nature of Meyer's entitlement," Pattullo was immune from a suit for damages. *Id.*

In any event, in *Meyer* the bank officer removed had been with the financial institution for 16 years, and he was allegedly terminated by the FSLIC without notice. Pelletier, on the other hand, had been a managing officer of a *de novo* thrift institution for less than a year and was subject to a regulatory scheme that quite plainly required that his position be subject to approval by the Board. Moreover, the government in this case did not order Pelletier terminated – that decision was made by Pioneer, a private institution.

It is equally clear that Behrens is a federal employee under the FTCA, even though his salary was paid by the FHLB-SF, a privately owned institution. The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965). Under the FTCA, the term "employee"of the government" includes "officers or employees of any federal agency," members of the military or naval forces of the United States, and most importantly for our purposes, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. This definition was intended to be read liberally. See *Witt v. United States*, 462 F.2d 1261, 1263 (2d Cir. 1972); *Ferguson v. United States*, 712 F.Supp. 775, 781 (N.D. Cal. 1989). The definition clearly covers Behrens, who was a properly appointed Supervisory Agent. Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent, *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added).

(b). The remaining question is whether Behrens was acting within the scope of his employment when he declined to approve or disapprove Pelletier until the BHSL investigation had been completed. The district court determined that he was not acting within scope, but this was error. An employee is acting within the scope of his employment under the law of California "when he is engaged in work he was employed to perform, or when

the act is incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience." See 29 Cal. Jur. 3d, Section 107, page 743 (1986 ed.).[7] Under the California standard, there is no doubt that Behrens was simply performing his job, and thus was within the scope of his employment. As a duly appointed Supervisory Agent, Behrens was authorized by statute to act broadly in the agency's interests. See 12 C.F.R. 501.11(e); 12 C.F.R. 571.6. Since under the regulations the agency "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable," *id.*, Behrens was acting within the scope of his authority when, on behalf of the agency, he declined to approve or disapprove Pelletier as president of Pioneer. Plainly, there was ample evidence that the plaintiff had mismanaged the Beverly Hills Savings & Loan Association, prior to his association with Pioneer. Moreover, Behrens took his action pursuant to Bank Board Resolution No. 84-164 (March 29, 1984), which conditioned Pioneer's insurance on its agreement to employ "a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent."

In sum, the United States should have been substituted for the defendant under the Reform Act.

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[7] To exonerate an employer from liability for his employee's action, "the employee's deviation from his duty must be for entirely personal purposes." See *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal Rptr 106 (1986).

C. The Public Interest And Lack Of Harm To Pelletier

These final factors are self-evident, and need little discussion. They favor granting the stay.

The public interest clearly lies in staying the district court trial pending appeal. Behrens will be irreparably harmed by a trial, and so will the public interest in having the decisions of this Court and the Supreme Court followed – decisions which hold that immunity is to be determined *prior* to trial.

No irreparable harm will be caused the plaintiff by such actions. Indeed, staying trial until this appeal is decided will help all parties by having a definitive ruling on immunity, and a clear indication from this Court whether the defendant was acting with scope. As we have already pointed out, without a definitive ruling from this Court on the scope issue, the trial proceedings will be confused and unworkable, since many of plaintiff's causes of action against the United States are not maintainable if the defendant was acting outside the scope of his employment.

CONCLUSION

For the foregoing reasons, a stay of all trial proceedings in the district court, pending appeal, is respectfully requested.

Respectfully Submitted,

/s/ Barbara L. Herwig
BARBARA L. HERWIG
(202) 514-5425
FTS 368-5425

/s/ Richard A. Olderman
RICHARD A. OLDERMAN
(202) 514-1838
FTS 368-1838
Attorneys, Appellate Staff
Civil Division, Room 3343
Department of Justice
Washington, D.C. 20530-0001

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